TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1917

No. [redacted] 101

JOHN HAMILTON BROWN, SURVIVING CLAIMANT OF JOHN H. BROWN AND HARVEY M. MUNSELL, TRUSTEES, APPELLANT,

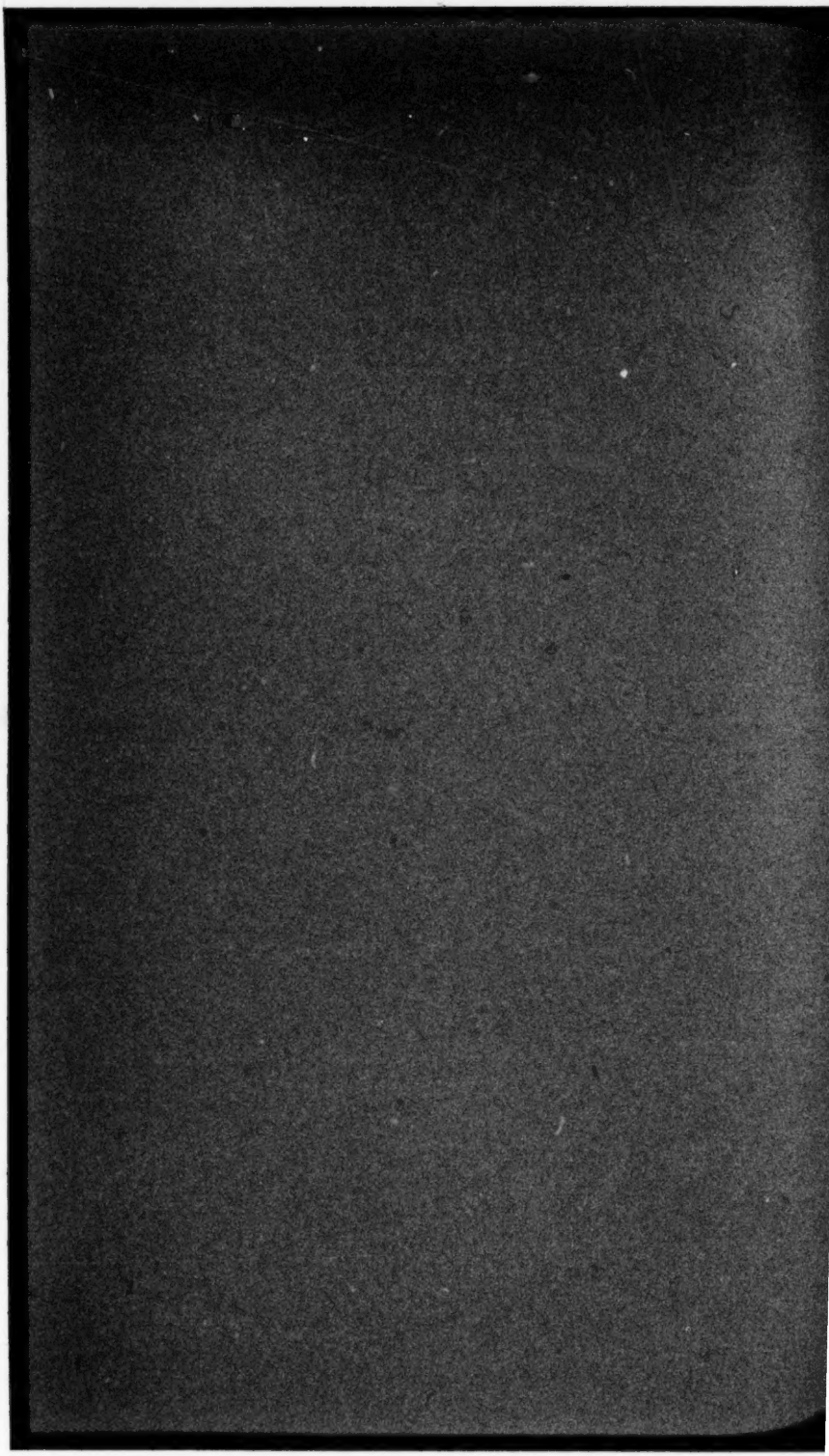
vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 18, 1918.

(25,128)



(25,128)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 845.

JOHN HAMILTON BROWN, SURVIVING CLAIMANT OF JOHN H. BROWN AND HARVEY M. MUNSELL, TRUSTEES, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 18, 1916.

1 & 2 In the Court of Claims.

No. 29949.

JOHN HAMILTON BROWN, Surviving Claimant of John H. Brown & Harvey M. Munsell, Trustees,

v.

THE UNITED STATES.

I. *Note of Filing of Original Petition.*

The original petition was filed in this case January 7, 1907, and an amended petition January 17, 1907, by John H. Brown & Harvey M. Munsell, Trustees.

A motion suggesting the death of Harvey M. Munsell was filed as follows:

"Now comes John Hamilton Brown, in his own proper person, and suggests to the court and gives the court to be informed that his co-claimant and trustee, Harvey M. Munsell, departed this life on the 19th day of February, 1913, and that no administration has, as yet, been taken out on his estate. He therefore moves that this cause proceed in the name of himself, John Hamilton Brown, as surviving trustee and claimant, with leave to any legal representative of said Harvey M. Munsell hereafter appointed to come in and be made a party to this cause at any stage of the case.

JOHN HAMILTON BROWN,
Surviving Claimant.

Filed Dec. 6, 1913, Court of Claims.
Allowed, Dec. 12, 1913.

EDWARD K. CAMPBELL,
Chief Justice.

Thereafter by leave of the court said John Hamilton Brown filed the following:

3 II. *Amended Petition.*

In the Court of Claims.

No. 29949.

JOHN H. BROWN, Suviving Claimant of John H. Brown & Harvey M. Munsell, Trustees,

v.

THE UNITED STATES.

Amended Petition.

Filed March 9, 1914.

[Original Petition Filed January 7, 1907.]

To the Honorable the Court of Claims:

The claimant, John H. Brown, survivor of John H. Brown and Harvey M. Munsell, trustees, respectfully represents:

1. The claimant, together with Harvey M. Munsell, deceased, Trustees of the Brown Segmental Tube Wire Gun, hereinafter styled the claimants, on the 18th day of May, in the year 1898, entered into a contract with the United States, represented by the Chief of Ordnance of the Army, for the manufacture and delivery to the United States of twenty-five five-inch and twenty-five six-inch Brown Segmental Tube Wire Guns, subject to certain tests therein prescribed, with their mounts, the mounts to be similar to certain rapid-fire gun mounts used in the Navy, a copy of which contract is annexed to this petition, entitled Exhibit A, and made a part thereof. The claimants, upon the contract being made, proceeded to carry out the same, and went to great expense both by themselves and through their subcontractors, the Diamond Drill & Machine Company,

4 now known as the Birdsboro Steel Foundry & Machine Company, of Birdsboro, Pennsylvania, in and for manufacturing the guns and mounts required by the contract.

2. That pursuant to the terms of said contract, said Diamond Drill & Machine Company, now Birdsboro Steel Foundry & Machine Company, expended for and in behalf of the claimants, in accordance with a subcontract made with said company by the claimants for that purpose, the following amounts:

For 5-inch Guns.

Drafting work, 3650¼ hrs., at 55¢		$2,007.63
Pattern work, 2800¼ hrs., at 55¢, day time	$1,540.13	
Pattern work, 30 hrs., at 80¢, night time	24.00	
Pattern work, 45½ hrs., at 25¢, night time	11.37	
		1,575.50
Machine work, 27,348 hrs., at 55¢, day time	$15,041.40	
Machine work, 2,085¼ hrs., at 80¢, night time	1,668.20	
Machine work, 197 hrs., at 25¢, night time	49.25	
		16,758.85
Vise work, 13,374½ hrs., at 55¢, day time	7,355.97	
Vise work, 557¾ hrs., at 80¢, night time	446.20	
Vise work, 14 hrs., at 25¢, night time	3.50	
		7,805.67
Smith work, 1,844¾ hrs., at 55¢, day time	$1,014.61	
Smith work, 5 hrs., at 80¢, night time	4.00	
		1,018.61
Labor, 10,680½ hrs., at 25¢, day time	$2,670.12	
Labor, 1,976¼ hrs., at 50¢, night time	988.12	
Labor, 360¼ hrs., at 50¢, night time	150.12	
		3,838.36
Lumber		114.35
Wrought iron and steel		16,730.63
Bronze		176.37
Bolts and nuts		68.35
Miscellaneous		1,320.79
		$51,415.11

Credits.

Defective castings:

16 doors		
5 hinge rings, 2,530 lbs., at 6¢	$151.80	
4 doors, 1,010 lbs., at 10¢	101.00	
3 doors, 330 lbs., at 10¢	33.00	
	$285.80	
		$51,129.31

5 *For 6-inch Guns.*

Drafting, 425 hrs., at 55¢	$233.75	
Pattern work, 551½ hrs., at 55¢	303.34	
Lumber	29.64	
Miscellaneous	4.68	
	$571.41	

For Gun Mounts.

Drafting, 3 hrs., at 55¢		$1.65
Pattern work, 2,069¾ hrs., at 55¢, day time	$1,138.36	
Pattern work, 158½ hrs., at 25¢, night time	39.63	
Pattern work, 67 hrs., at 80¢, night time	53.60	
		1,231.59
Machine work, 10,152½ hrs., at 55¢, day time	$5,583.88	
Machine work, 56 hrs., at 25¢, night time	14.00	
Machine work, 653¼ hrs., at 80¢, night time	522.60	
		6,120.48
Vise work, 5,076 hrs., at 55¢, day time	$2,791.80	
Vise work, 2½ hrs., at 80¢, night time	2.00	
Vise work, 2 hrs., at 25¢, night time	.50	
		2,794.30
Smith work, 509¾ hrs., at 55¢, day time	$280.36	
Smith work, 2½ hrs., at 25¢, day time	.62	
		280.98

Labor, 2,228¾ hrs., at 25¢. day time	$557.13	
Labor, 73 hrs., at 50¢, night time	36.50	
		593.63
Wrought iron and steel		2,854.09
Lumber		95.43
Bronze		660.46
Bolts and nuts		18.31
Miscellaneous		222.98
		$14,873.90

Credits.

Steel castings returned:		
American Steel Castings Co., 1 breech, 2,710 lbs., at 6¢	$162.60	
Atha & Illingsworth Co., 2 boxes, 4,686 lbs., at 6¢	281.16	
		443.76
		$14,430.14

6 *Machinery Built for this Contract.*

1 22 ft. plate bender	$6,427.81	
1 wire-winding machine	939.19	
Proving grounds (Hampton)	2,036.26	
Proving grounds (Furnace)	679.10	
1 liner extractor	195.37	
1 fixed-ammunition gauge	49.77	
1 test tube	394.20	
1 milling head for recoil cylinder	224.90	
1 yoke for forcing liners into segments	744.71	
12 expansion centers and sleeves	181.41	
1 boring bar for chase jacket	316.73	
1 elevating device	26.88	
1 breech model	248.89	
1 model with externally grooved liner	58.69	
1 breech action model	470.65	
Firing-screen frames, etc	39.11	
Foundation for gun mounts	156.06	
Settlement of damages to property at proving grounds	323.35	
		$13,513.17
Total		$79,644.03

all of which expenditures were made or authorized prior to February 28, 1900, and on account of which, with interest thereon from the dates of expenditures, the claimant claims compensation and reimbursement.

3. That claimants through their subcontractors, said Diamond Drill and Machine Company, afterwards Birdsboro Steel Foundry & Machine Company, moreover, bought, or caused to be bought, the following special machinery to further facilitate and prepare for the rapid building of the aforesaid guns and mounts, being numbered and described as follows, with the price paid for same, giving credit for all trade discounts thereon:

No.	Machine.	Amount.
82	Draper lathe, 16" 10 ft.	$343.00
83	Fifield lathe, 40" 34 ft.	1,372.00
84	Draper lathe, 30" 10 ft.	588.00
85	Reihle test machine.	490.00
86	Draper lathe, 14" 9 ft.	588.00
87	Gisholt tool grinder.	225.40
88	Becker milling machine.	882.00
	Carried forward	$4,688.40
7	Brought forward	$4,688.40
	89 26" drill press.	147.00
90	Walker tool grinder.	333.40
91	No. 8 Kempsmith miller.	790.90
92	Diamond emery grinder.	88.20
93	26" drill press.	147.00
94	26" Draper lathe.	1,347.50
95	26" Bullard lathe.	1,347.50
96	Bullard vertical boring mill.	1,310.75
97	42" Fifield gun lathe.	2,450.00
98	Hydraulic ram	1,523.26
99	No. 2 diamond tool grinder.	88.20
100	Draper lathe, 24" 10' 6"	656.00
101	Draper lathe, 15".	332.50
102	Draper lathe, 15".	332.50
103	10-ton electric crane.	2,250.00
104	Draper lathe, 42" 25 ft.	1,783.60
105	Draper lathe, 42" 25 ft.	1,911.00
106	Prentiss lathe, 14".	289.10
107	Draper lathe, 17".	392.00
108	Draper lathe, 18".	392.00
109	Draper lathe, 32".	1,078.00
110	16-ton Whiting crane.	2,820.00
111	26' x 26" x 6' planer	416.50
112	No. 4 Bement boring mill.	2,565.00
113	Centrifugal oil separator.	75.00
	Cost of erecting 16-ton crane.	437.04
	Cost of erecting 10-ton crane.	209.95
	Cost of Gould's power pump, used with hydraulic ram, per bill of Fairbanks Co., December 8th, 1898.	465.00
		$30,467.90

That the claimants further claim reimbursement for the said $30,467.90, with deduction and allowance, however, for the general value of the said special machinery, which the claimants are advised and informed is or was about forty per cent of the price paid for the same, the claim under this paragraph being $18,208.74, with interest thereon.

4. That the said claimants made, or caused to be made, further and other expenditures under and by reason of the said contract, and rendered, or caused to be rendered, services under and by reason of the said contract, the amount of said expenditures and the value of said service being the additional total sum of $42,578.18, which sum is further claimed, with interest thereon.

8 5. The claimants, under and pursuant to said contract, proceeded with the manufacture of the guns, and tendered one type gun of five-inch calibre, which was mounted as prescribed by the contract and specified by the defendant, and the same was sub-

jected to a test on the part of the proper authorities of the United States, who proceeded to, and did, make a thorough and severe and extraordinary test, firing the same with smokeless powder, the specifixed maximum of three hundred times, which resulted in an average muzzle velocity in excess of the contract requirements, and which test more than met the requirements of the contract in all respects.

6. The claimants further represent that, at a later date after long delay, the Chief of Ordnance made, under date of November 3, 1899, an indorsement upon the report of the United States inspector who conducted said test, in which indorsement the Chief of Ordnance stated:

"In the opinion of this office, while the type five-inch gun is not deemed as satisfactory a gun as is desirable for service, yet its test has apparently met the contract requirements."

7. The claimants further say that the suggestion of the Chief of Ordnance, as the claimants aver on information and belief, was not adverse to the gun as manufactured and tested, but to the type of gun provided for in said contract of May 18, 1898, and that, notwithstanding the said contract, whereby the type of gun to be made had to be made had been settled upon and determined between the United States and these claimants, and, notwithstanding the unusually severe test and the fact that the gun had, according to his own admission, apparently met the contract requirements, the Chief of Ordnance then called upon these claimants to allow the said gun to be fired 100 additional rounds and at higher pressures than
9 those provided for in the contract, which, after mature consideration, these claimants found that they could not accede to.

8. That thereafter there was further consultation between these claimants and the Chief of Ordnance, resulting in an expression by the latter of a desire for theoretical calculations concerning the mechanical strength of this system of gun construction, and a request to furnish theoretical calculations which would enable the Ordnance Office to better understand the conditions of strain and resistance set up in this type of gun during high-pressure firing.

9. That upon this suggestion, and with the consent of the Chief of Ordnance, Professor J. E. Denton and Professor J. B. Webb, both of the Stevens Institute of Hoboken, N. J., were employed by these claimants to make the desired calculations, together with Major James M. Ingalls, Artillery Corps, U. S. A., who was designated by the Secretary of War, February 19, 1900.

10. That the character of the investigations were largely original in character, owing to the novelty of the method of construction, and the same were carried on in a painstaking manner; and it was not until January, 1901, that said experts completed their reports, which were voluminous and thorough, and which were extremely favorable to this method of gun construction.

11. That the Chief of Ordnance, having been informed, or having reason to believe, as the claimants are informed and believe, that said report was ready and about to be delivered and was favorable to the system of gun construction involved in this contract, and with

out any notice to the claimants of his purpose so to do, and
10 without specifically calling to the attention of the Secretary of War the practical suspension pending said investigation and report, submitted to the Secretary of War, in the form of a sixth indorsement upon the report of the test, a recommendation for authority to inform the claimants that, by reason of their failure to submit to the aforesaid additional test, unauthorized by the contract and referred to in Par. 7 of this petition, "said contract is declared to be null and void;" and thereafter, promptly upon the approval of said recommendation by the Secretary of War, to wit, on January 17, 1901, the Chief of Ordnance wrote a letter to these claimants, notifying them that they had not furnished an acceptable gun and that their contract was annulled. Said annulment of said contract was not made and taken in good faith, but under a mistake so gross as to justify an inference of bad faith.

12. That thereafter these claimants, in writing and orally, protested against said annulment of the contract of the Chief of Ordnance and to the Secretary of War, but without effect.

13. That the claimants aver that, by reason of the breach or breaches of the said contract of May 18, 1898, by and on the part of the United States Government, great wrong and injury and damage have been inflicted upon the claimants, and for which they claim compensation for the amount of the expenditures made, or caused to be made by them in this behalf, with interest, for the use and benefit of those concerned, as their respective interests may appear.

14. That these claimants, pursuant to said contract, and prior to a breach thereof, manufactured guns and mounts, as herein-
11 after set forth, and have the same on hand, together with the material, hereinafter mentioned, to wit:

1 5-inch gun and mount complete.
2 5-inch mounts complete.
1 5-inch mount, 90% completed.
1 5-inch mount, 50% completed.
1 5-inch mount, 99% completed.
1 gun rod for jacket, 50% completed.
Material on hand for 4 5-inch liner tubes.
Segments for 25 5-inch guns.
5,000 pounds wire.
4 breech mechanisms.

15. The claimant therefore claims as follows:

Expenditures as set forth in Par. 2		$79,644.03
Machinery as set forth in Par. 3	$30,467.90	
Less deduction of forty per cent of value thereof	12,187.16	
Difference constitutes loss		18,280.74
Other expenditures as set forth in Par. 4		42,578.18
Total		$140,502.95

together with interest on the several items from the date of the expenditures of, or for, the same, and as may be shown.

16. No assignment or transfer of this claim, or of any part thereof or interest therein, has been made, otherwise than as herein set forth; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant asks judgment for the sum of one hundred and forty thou-
12 sand five hundred and two dollars and ninety-five cents ($140,502.95), with interest thereon from the dates of the several expenditures.

GEORGE H. LAMAR,
Attorney of Record.

KING & KING, *Counsel.*

STATE OF NEW YORK,
County of New York, ss:

John Hamilton Brown, being duly sworn, deposes and says: I am the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

JOHN HAMILTON BROWN.

Subscribed and sworn to before me this 21st day of February, 1914.

[SEAL.] ROBERT B. ABBOTT,
Notary Public, Kings County.

Certificate filed in N. Y. Co., N. Y. Courts No. 17.

13 EXHIBIT A TO PETITION.

Article of agreement entered into this eighteenth day of May, eighteen hundred and ninety-eight, between Trustees of the Brown Segmental Tube Wire Gun of New York, in the county of New York, State of New York, of the first part, and the United States, by Brig.-Gen. D. W. Flagler, Chief of Ordnance, U. S. Army, acting under the direction and by authority of the Secretary of War, for and in their behalf, of the second part.

1st. This agreement witnesseth, that the said parties of the first part, for themselves and their successors, etc., and the said party of the second part, for and in behalf of the United States of America, have mutually agreed, and, by these presents do mutually covenant and agree, to and with each other, as follows, viz:

Under advertisement dated —— —, 189–, the said parties of the first part do hereby contract and engage with the said United States to manufacture for the Ordnance Department, U. S. Army, in accordance with their proposal of April 9, 1898, and the instructions

of the Secretary of War, dated April 18, 1898, copies of which are hereto attached and form part of this contract—

The following Brown segmental tube wire-wound R. F. guns, complete, ready for use, and furnished with mounts similar to the Navy R. F. gun mounts, viz:

25 of the 5-inch caliber at $9,175 each.

25 of the 6-inch caliber at 10,950 each.

The guns, carriages and accessories, such as are usually furnished for the service of similar pieces and carriages in the U. S. Navy of these calibers, shall be of material of American manufacture. The gun shall have a length of bore of about 45 calibers and weigh not more than about 7,600 pounds for the 5-inch and about 15,600 pounds for the 6-inch gun. The muzzle velocity shall not be less than 2,600 f. s., with a good smokeless powder that shall not give a pressure of over 40,000 pounds per square inch, using a projectile of 55 pounds weight for the 5-inch gun and 100 pounds weight for the 6-inch gun. The 6-inch gun must be adapted to the separate loading of projectile and cartridge. The powder chambers
14 to conform to those now adopted in the U. S. Navy for similar calibers. The guns, mounts, breech mechanism, all accessories and similar parts must be interchangeable. The system of rapid-fire breech mechanism employed will be either the Brown or Dashiell, and must meet with the approval of the Ordnance Department. The carriages must admit of traversing 360 degrees, or of all-around fire, of elevating the gun 15 degrees and depressing it 5 degrees.

It must permit of being easily and conveniently operated, and permit the same man to traverse, elevate, sight, and fire, without moving the eye from the sight. It must be adapted to use the Department's telescopic sight, be provided with a steel shield, the vertical portion of which must be at least 3 inches thick, and permit of firing over a parapet 4 feet high.

The material will be open to inspection by the Ordnance Department at all stages of manufacture, both as to quality of material and workmanship, in order to insure uniformity in the finished material, and the necessary facilities for the performance of their duty must be furnished inspectors without expense to the Department. Inspectors shall be supplied free with suitable office room at the manufacturer's works, and with such office furniture as may be necessary for the proper transaction of their business. All such tests of materials as the Department may desire in order to ascertain either the quality of the material or its uniformity will be made at the expense of the contractors. Inspectors will also have free access to all records of tests made by the manufacturers and to all parts of the works in order to witness all process of manufacture and fully acquaint themselves with the condition of the work.

The manufacturer will furnish the Department with complete and detailed drawings on tracing cloth, and also a description of the guns, mounts, and accessories furnished. The first gun manufactured will be fired with full service charges of powder, such as that

used in testing other rapid-fire guns of similar caliber, and with not more than the regular service pressures for endurance, and
15 the gun must be fired for endurance 300 rounds or less as rapidly as practicable at the proving grounds of the manufacturers, commencing as soon as the gun is completed and continue firing as the Department may require, 5 rounds to be fired with pressures of about 45,000 pounds, and shall not exceed 50,000 pounds, these to be included in but at close of the test, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily.

The first gun made of the other caliber to be tested at the same place and passed upon in the same manner, without any unnecessary delay, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily.

Both gun and carriage must endure these tests in all respects satisfactorily, both as to the strength of material and facility of operation.

Such letters, numbers, and marks as may be designated by the Department will be stamped upon the guns and carriages, and the name, The Brown Segmental Tube Wire Gun, its number, and the year in which made will be placed upon it. Suitable breech and muzzle covers for the preservation of the breech mechanism and the rifle bore, and chest provided with the usual necessary tools, accessories, and spare parts such as usually go with 5 and 6-inch rapid fire guns, will be furnished with each gun.

It is stipulated and agreed that the party of the first part shall deliver for test the first complete gun with mount, etc., within three months from the date of execution of this contract, and as soon as tested and approved (and it shall be tested and passed upon without delay as soon as completed), four guns with mounts, etc. (subject to 5 usual proof rounds in the usual way), every month after receiving notification that the test is satisfactory are to be delivered, until the whole number contracted for are made and delivered to the Government, f. o. b. at the place of manufacture.

The cartridges for all tests and proof shots must be loaded in the presence of an inspector provided by the party of the first part, and said inspector shall have the privilege of placing his
16 mark on each one. The party of the first part will provide proving grounds and platform near the works where guns are manufactured, and at its own expense.

It is further stipulated and agreed that the United States shall have the right, within 60 days from the date of the execution of this contract, to order one hundred and fifty additional of these guns and mounts (5-inch and 6-inch caliber in equal proportions), complete in all respects as provided for in this contract for said 50 guns, at an average net cash price of $9,687 each, and each gun to be subject to 5 proof rounds in the usual way only, and the party of the first part hereby stipulate and agree, if so ordered, to deliver them at the rate of nine per month until the additional one hundred and fifty (150) are all made and delivered, delivery to commence during

the fourth month from date of the execution of the contract for the 150 guns.

It is further stipulated and agreed that if any gun, with mount, etc., herein contracted for is not delivered by the party of the first part at the times specified herein, there will be deducted, in the discretion of the Chief of Ordnance, five (5) dollars per day from the price to be paid therefor for each day of delay in such delivery. But if at any time the Chief of Ordnance shall decide that continuous and great delay or other serious default has occurred, he may, to protect the interests of the United States, apply the provisions of the 5th section of the regular contract form and waive further per diem deduction in price.

All penalties incurred under this contract shall be off-set against any payments falling due to the said party of the first part.

The work must pass the required inspection at all stages of its progress, and shall be inspected and passed upon at all times without any unnecessary delay, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States.

Payment to be made on each gun with carriage and accessories after acceptance.

If any doubts or disputes arise as to the meaning of any-
17 thing in this or any of the papers hereunto attached and forming this contract, the matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final.

2d. All the guns, etc., herein contracted for shall be delivered by the said parties of the first part as aforementioned.

3rd. The said parties of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the guns, etc., herein contracted for.

4th. For the guns, etc., herein contracted for, which shall be delivered, inspected, and accepted as aforesaid, there shall be paid by the United States to the said parties of the first part, on bills in duplicate, made in approved form, and duly authenticated by the proper officers of the Ordnance Department, the prices aforementioned in the funds furnished for the purpose by the United States.

5th. If any default shall be made by the parties of the first part in delivering all or any of the guns, etc., mentioned in this contract, of the quality and at the times and places herein specified, then, in that case, the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said parties of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the Chief of Ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United

States to recover for defaults which may have occurred; but in case of overwhelming and unforeseen accident, by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States, before claiming forfeiture for non-delivery at the time specified.

6th. Neither this contract nor any interest therein shall be transferred by the said parties of the first part to any other party;
18 and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said parties of the first part are reserved to the United States.

7th. No member of or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

J. H. BROWN, [SEAL.]
H. M. MUNSELL, [SEAL.]
Trustees of the Brown Segmental Tube Wire Gun.
D. W. FLAGLER,
Brig. General, Chief of Ordnance.

Witnesses:

EDWARD BROOKE.
A. W. PORTER.

Know all men by these presents, that we, Trustees of the Brown Segmental Tube Wire Gun of New York, in the State of New York, as principal, and George Brooke, of Birdsboro, in the State of Pennsylvania, and Robt. E. Brooke, of Birdsboro, in the State of Pennsylvania, as sureties, are held and bound unto the United States of America in the penal sum of fifty-one thousand dollars, to the payment of which sum, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Given under our hands and seals this twenty-third day of May, 1898.

The condition of this obligation is such, that whereas, the above-bounden Trustees of the Brown Segmental Tube Wire Gun have, on the eighteenth day of May, 1898, entered into a contract with the United States by Brig.-Gen. D. W. Flagler, for guns, etc.

Now, therefore, if the above-bounden Trustees of the Brown Segmental Tube Wire Gun and their successors, etc., shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by Trustees of the Brown Segmental Tube Wire Gun to be observed and performed, and according to the
19 true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term

of the same, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

J. H. BROWN, [SEAL.]
H. M. MUNSELL, [SEAL.]
Trustees of the Brown Segmental Tube Wire Gun.
GEO. BROOKE. [SEAL.]
ROBT. E. BROOKE. [SEAL.]

Witnesses:
LESLIE GRISCOM.
JOSEPH H. TEMPLIN.
GEORGE BROOKE, JR.

STATE OF PENNSYLVANIA,
County of Berks, ss:

I, Geo. Brooke, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of fifty-one thousand dollars over and above all my debts and liabilities.

GEO. BROOKE.

Subscribed and sworn to before me this twenty-third day of May, 1898.

[SEAL.] CYRUS G. HENRY,
Notary Public.

STATE OF PENNSYLVANIA,
County of Berks, ss:

I, Rob't E. Brooke, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of fifty-one thousand dollars over and above all my debts and liabilities.

ROB'T E. BROOKE.

Subscribed and sworn to before me this twenty-third day of May, 1898.

[SEAL.] CYRUS G. HENRY,
Notary Public.

I, Samuel Bell, Clerk C. C. U. S., do hereby certify that Geo. Brooke and Rob't E. Brooke, the sureties above named, are personally known to me, and that, to the best of my knowledge and belief, each is pecuniarily worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

SAMUEL BELL,
Clerk of the Circuit Court of the United States for the Third Circuit and Eastern District of Pennsylvania.

Indorsed: July 13, 1898. Distributed. Extended to Oct. 31, 1898. Extended to Jan. 16, 1899. Extended to Feb. 15, 1899. Extended to March 15, 1899.

21 & 22 III. *Traverse. Filed January* 5, 1915.

In the Court of Claims of the United States, December Term, A. D. 1914.

No. 29949.

JOHN HAMILTON BROWN, Surviving Claimant of John H. Brown, & HARVEY M. MUNSELL, Trustees,

v.

THE UNITED STATES.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney-General.

IV. *Argument and Submission.*

This case was argued on the 5th of January, 1915, and again on the 21st of October, 1915, by Mr. George A. King and Mr. George H. Lamar for the claimant, and Mr. W. F. Norris, for the defendants, and submitted.

23 V. *Findings of Fact and Conclusion of Law.*

Court of Claims of the United States.

No. 29949.

(Decided December 6, 1915.)

JOHN H. BROWN, Surviving Claimant of John H. Brown, and HARVEY M. MUNSELL, Trustees,

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The surviving claimant, John H. Brown, together with Harvey M. Munsell, his original coclaimant (hereinafter referred to as the

claimants), on the 18th day of May, 1898, entered into the contract with the United States set forth in full as Exhibit A to the petition herein, together with the bond annexed thereto.

The sureties on the claimants' bond for the performance of the said contract were officers of the Diamond Drill and Machine Co., of Birdsboro, Pa., the name of which company was in 1905 changed to Birdsboro Steel Foundry and Machine Co.

By successive indorsements on the contract the time for the completion of the first, or type, gun was extended from August 8, 1898, to March 15, 1899.

II.

The said Diamond Drill and Machine Co. owned and operated a large foundry and machine shop, in leased premises, at Birdsboro; and on May 23, 1898, it entered into a contract with the claimants, at certain specified rates of compensation, for the construction for the claimants of all guns and mortars for which they might secure contracts; whereupon said company proceeded to increase its plant and equipment for carrying out its contract with the claimants, purchasing, constructing, and installing a large amount of materials and additional machinery, and, under the guidance of the claimant, John H. Brown, started in to construct the type 5-inch gun and its mount required by the claimants' contract with the Government, and also began as soon thereafter as possible the construction of other guns and mounts called for by the contract.

24 In all, during the lifetime of the contract, there were constructed by the said Diamond Drill and Machine Co. for the claimants the following guns and mounts to approximately the following proportions: One 5-inch gun and mount complete; two 5-inch mounts complete; one 5-inch gun 90 per cent completed; one 5-inch gun to the point of rifling, but ruined in boring; one 5-inch mount 90 per cent completed; one 5-inch mount 50 per cent completed; one gun rod for jacket 50 per cent completed, all of which have since remained in possession of said company.

III.

It was arranged between the Chief of Ordnance and the claimants that "The 6-inch-type gun will not be submitted for test until after all the 5-inch guns, or nearly all, have been completed."

The type 5-inch gun was completed in the early part of 1899 and was tested on proving grounds provided by the Diamond Drill and Machine Co. near the company's plant at Birdsboro. The test began March 8, 1899, under the inspection of Capt. Ira MacNutt, of the Ordnance Office, and after the 133d round, firing was suspended from April 14, 1899, until June 30, 1899, in order to prepare a new proving ground. The firing was then continued until the completion of the test on August 9, 1899, and on August 29 following Capt. MacNutt made his report on the test to the Chief of Ordnance.

The test firing began with a pressure of 18,000 pounds per square inch, which was raised on the second round to 21,050 pounds, and on

the third round to 32,800 pounds, with a muzzle velocity of 2,705 feet per second, and on the fou-th round to 35,750 pounds pressure, with a muzzle velocity of 2,821 feet per second, on which round the carriage was injured, it not being strong enough to stand such high muzzle velocities.

The claimants then protested against the increases made in the powder charge and insisted that any charge that was sufficient to produce a muzzle velocity of 2,600 feet per second was all that was required by the contract, except for the five high-pressure rounds required at the close of the test. This question was submitted to the Chief of Ordnance before firing was continued and by him decided in favor of the claimants. Thereafter the powder charge was so adapted as to give this muzzle velocity of 2,600 feet per second as a general rule, except in the said five high-pressure rounds at the close of the test, which were fired with pressures of between 45,000 and 50,000 pounds per square inch. On one of these high-pressure rounds, the 293d round, the breech bushing and jacket of the gun were cracked and the breech could not be opened by hand.

These breaks were repaired, but the mechanism repaired did not operate satisfactorily thereafter.

During the course of the test the gun was star-gauged by the Government inspector about every 50 rounds, and these gaugings, at different times throughout the test and at different points in the bore, indicated varying and shifting changes, both increases and decreases, in the diameters of different cross-sections of the bore, the gauging at several times and places indicating a reduction of the normal diameter of 5 inches down to 4.99 inches; and as a precaution against the danger of rupture or explosion of the gun by a reduction of the bore sufficient to cause the projectile to stick in the bore when the gun was fired an iron plug of the diameter of the projectile was passed through the bore about every 10 or 12 rounds, on one of which occasions, about the 100th round, it stuck in the bore so tight at one point as to require the efforts of three men to force it through with a pole.

At all times, with this exception, the plug passed through freely.

These reductions and variations in the diameter of the bore of the gun were to some extent due to deposits of metal on the walls of the bore by abrasion from the projectile in its passage from the gun, but were principally due to changes in the cross section of the bore from a round to an elliptical form, resulting from a shifting of the segments enveloping the liner tube by the explosion of the charge, and also to an actual contraction of the bore by the compression of the liner tube forming the walls of the bore by the elastic tension of the wire with which the tube and its enveloping segments were wound and bound together, which tension, with the further increase therein resulting from the explosion of the charge upon reaction after the explosion, exercised a compressing effect upon the liner tube.

In large guns of ordinary types of construction there is usually a slight contraction of bore during the first few rounds of firing, after which the gun settles down to a new condition, and thereafter the

changes of bore diameter in a normal gun are almost entirely in the way of increase of diameter from erosion and abrasion.

While the variations and reductions in the diameter of the bore of the type gun indicated by the star-gauging during the firing test did not quite reach a point of actual danger to the gun from rupture or explosion by sticking of the projectile in the bore in the process of firing they did reach the limit of safety in this respect, and created a reasonable apprehension of danger in the minds of the Chief of Ordnance and other officials of the War Department connected with the execution of the contract for the guns, and caused the Chief of Ordnance and the Secretary of War to refuse to pass and accept the type gun unless it should satisfactorily pass a further test of 100 additional rounds, as proposed and recommended by the Chief of Ordnance in his indorsement of November 3, 1899, hereinafter set forth. This apprehension was heightened by the fact of the new and comparatively untried type of construction of the gun, and by its reversal of the usual behavior of guns of the ordinary types of construction in the way of its continued contractions and changes of bore in the course of extended use.

IV.

Following the completion of the test of the type gun on August 9, 1899, the claimants applied personally to the Ordnance Office for official action on the test, and at different times discussed the test and the matter of official action thereon with Maj. Charles S. Smith, who, being in charge of the division of guns, powder, and projectiles, had immediate supervision of the test. In the course of their conversations with Maj. Smith it was conceded that certain modifications in the construction of the gun were advisable and would be made in any succeeding guns that might be constructed under the contract.

26 Toward the latter part of October, 1899, the claimants again called at the Ordnance Office and asked the result of the test of the gun. Maj. Smith said, "It appears to have passed"; whereupon Munsell replied, "Yes, it does; and we can go on with the completion of the guns?" to which Maj. Smith replied, "Yes."

Shortly after the above conversation with Maj. Smith the claimants, on November 3, 1899, wrote the Chief of Ordinance stating that they had been informed by Maj. Smith that the Ordnance Department had, after due deliberation, passed the type gun and its carriage, and requesting the Chief of Ordnance to write an official letter passing the gun and carriage, as it had then been nearly three months since the completion of the test, and they had as yet received no formal notification of the result of it. This letter was duly received at the Ordnance Office, and no response was made to said request of the claimants therein.

On November 3, 1899, the Chief of Ordnance officially submitted to the Secretary of War the report of Capt. MacNutt, the inspecting officer, on the test of the gun with a "First indorsement" and recommendation by the Chief of Ordinance thereon, as follows:

"Respectfully submitted to the honorable Secretary of War for instructions.

"A full history of the contract with the trustees of the Brown segmental tube-wire gun for 25 5-inch and 25 6-inch R. F. guns on their system with this department, and a brief of all correspondence relating thereto and of the record of test of the first, or type, 5-inch gun, is in the hands of the Secretary of War in the form of an unofficial memorandum, and which contains, it is believed, a full statement of the case.

"In the opinion of this office, while the type 5-inch gun is not deemed as satisfactory a gun as is desirable for service, yet its test has apparently met the contract requirements, and if certain modifications in the gun and its carriage shall be made in their further manufacture to remedy defects developed in the test, and in other respects be made to meet more fully the requirements of the department, to which propositions the company willingly agree, it is recommended that the 5-inch type gun and its mount be accepted, subject, however, to the condition that, in view of the moderate pressure to which this gun has been subjected, the department fire it 100 additional rounds, or less, as it may deem expedient, with charges giving higher pressures and assimilating more nearly the pressures that would be experienced in actual service, and that in the further manufacture of the guns they shall be modified, at the expense of the company, so as to remedy any further defects that may be developed in these additional firings."

This indorsement and recommendation of the Chief of Ordnance was referred by the Secretary of War to the Chief of Engineers, by whom it was indorsed on November 30, 1899, and subsequently returned to the Secretary of War, by whom the indorsement and recommendation of the Chief of Ordnance was approved on January 31, 1900; and pursuant thereto Capt. MacNutt, in compliance with instructions from the Chief of Ordnance, notified the claimants on February 6, 1900, of the decision and recommendation of the Chief of Ordnance and its approval by the Secretary of War. It was understood that the further test of one hundred additional
27 rounds proposed by the Chief of Ordnance was to be carried out at the expense of the Government.

V.

On January 22, 1900, while the said recommendation of the Chief of Ordnance of November 3, 1899, was pending in the office of the Secretary of War, Tracy, Boardman & Platt, attorneys at law, of New York, wrote the Secretary of War that they had been retained as counsel by the claimants in the matter of certain modifications in the guns in question, as to which they understood a question was then pending in the War Department, upon which they asked an opportunity to be heard before it was considered and decided by the department. This letter was referred to the Chief of Ordnance, who, on January 27, 1900, indorsed thereon a statement of the status of the case, and on January 31, 1900, the Secretary of War wrote

said attorneys that it did not appear that there was pending before the department any question in relation to the contract referred to.

On February 9, 1900, the claimants wrote the Secretary of War renewing their application that further action be suspended until they could be heard in the matter, and stating that they had not as yet assented to any modification of the gun and carriage and that they had not been informed in any precise and definite manner what those proposed modifications were except in reference to the carriage, and that they could not understand upon what principle the type gun was to be subjected to a further test of one hundred additional rounds with charges giving higher pressures.

VI.

On May 16, 1899, it was suggested to the claimants that they present to the Ordnance Office, to be presented to the Chief of Ordnance, the mathematical computations and engineering considerations upon which their claims of strength of construction and other qualities of their gun were based, the Ordnance Office never having been furnished such information. Nothing was done by the claimants, however, in the matter until after their official notification on February 6, 1900, of the War Department's action on the test of the type gun, when, after conferring with the Chief of Ordnance in the matter, they, on February 17, 1900, wrote the Chief of Ordnance as follows:

"In pursuance of the suggestions of Maj. Smith and yourself, we have employed Professor Denton, of Stevens Institute, at Hoboken, N. J., as an expert to work out the various problems connected with the construction of the 5-inch Brown segmental tube-wire gun.

"At Prof. Denton's request we have also employed and associated with him in our work Mr. Webb, professor of mathematics in the Stevens Institute. It will be necessary, however, for these gentlemen to have some technical assistance in their work, and it has therefore been suggested that it will be of the greatest benefit if an officer of practical experience with artillery could be connected with them in the work. Of course we should expect to make proper compensation to any officer so employed, as it will only occupy time when he would otherwise be at leisure. If this plan should com-
28 mend itself to you, we would suggest Maj. James S. Ingalls as one whose ability and experience would qualify him for the work in a high degree. We have had some communication with Maj. Ingalls on the subject, and he has expressed his willingness to make such an arrangement, provided that it meets with the approval of the department and yourself. Hoping this suggestion will receive your favorable consideration, we are, with great respect, etc."

On February 19, 1900, the Chief of Ordnance submitted this letter to the Secretary of War, with the following indorsement:

"As this office had no information as to the mathematical basis on which the Brown segmental 5-inch and 6-inch wire guns were being built, and the company was unable to furnish it, it was suggested to the trustees by this office last spring that they employ a competent

person to investigate the matter and demonstrate analytically that the claims of the company respecting the merits of their system were well founded, as well as to determine theoretically the best tensions to be employed in applying the wire. The within letter is the outcome of the suggestion made at that time by the department. I would therefore respectfully recommend that the within request be approved and that Maj. Ingalls be authorized to render the assistance desired by them if it can be done without interfering with the discharge of his regular duties."

On the same date, February 19, 1900, this indorsement and recommendation of the Chief of Ordnance was approved by the Secretary of War.

The said Denton, Webb, and Ingalls first went to Birdsboro, Pa., and there inspected and examined the gun. The claimant, Brown, went repeatedly to the Stevens Institute of Technology at Hoboken, N. J., with models, plans, and charts, which he furnished to Prof. Denton, and also gave Ingalls data in regard to the firing of the gun.

The said Denton, Webb, and Ingalls, upon being employed by the claimants, extended their investigations over a period of practically a year, at the close of which reports were made by them to the claimants, but not, however, until after the annulment of their contract by the Chief of Ordnance, as hereinafter set forth.

These reports were, upon the whole, favorable to the style of construction of the gun; but defects of construction were pointed out and remedies therefor suggested in the way of modifications in the construction.

VII.

On January 11, 1901, after the notification of the claimants of the department's action on the test of the type gun, and having received no acceptance from the claimants of the department's official proposition therein for a further test of 100 additional rounds, and for modifications to overcome defects in the gun which had been, and which might further be, developed in the test firing, the Chief of Ordnance returned Capt. MacNutt's report on the test, with the prior indorsements thereon, to the Secretary of War with a sixth indorsement recommending that his office be authorized to declare the claimants' said contract null and void because of the claimants having failed "to comply with the requirements of the Secretary of War and in further accordance with the provisions of the contract." This recommendation was approved by the Secretary of War; and there-
29 upon, on the 17th day of January, 1901, the Chief of Ordnance wrote the claimants that, as they had up to that time failed to deliver an acceptable gun, their contract was thereby declared null and void.

Against this action the claimants immediately protested and appealed to the Secretary of War for a revocation of the annulment of the contract; but the Secretary of War, after a number of hearings of the claimants and their attorneys in the matter, refused to revoke the annulment.

VIII.

Pursuant to its contract with the claimants for the manufacture of all guns and mortars for which the claimants might secure contracts, the said Diamond Drill and Machine Co., of Birdsboro, Pa., increased the general equipment of its plant by the purchase and installation of additional machinery, costing it the sum of $30,467.90, which machinery, with the exception of two large lathes sold by the company some time later, is still retained and has been in normal use by said company.

Also pursuant to its said contract with the claimants said Diamond Drill and Machine Co. constructed and installed special gun-construction machinery at a cost of $10,474.46, which machinery has been retained by the company, but for which it has had no use since the annulment of the claimants' said contract with the defendants.

Said company also constructed proving grounds for the testing of such guns as should be constructed by it, the cost of which grounds was $2,715.36. There was also settled by said company damages to property at said proving grounds in the sum of $323.35.

The cost of the materials purchased and work done by said company, together with the miscellaneous expenses incident thereto, in its construction work on the guns and mounts called for by the claimant's contract with the defendants was as follows:

For 5-inch guns	$51,129.31
For 6-inch guns	571.41
For gun mounts	14,430.14
	66,130.86

A portion of the materials purchased by said company for said work was not used therein and has remained on hand since the work was discontinued, little if any of which materials is of practical use or value to the company, and the value of which does not appear from the evidence.

Of the above expenditures, $7,263.33 were made and paid by the Diamond Drill and Machine Co. subsequent to October, 1899.

Construction work by the claimants and their subcontractor, the Diamond Drill and Machine Co., on the guns and mounts called for by the claimants' said contract with the defendants began shortly after the execution of said contract and continued for eighteen months thereafter. During this time the claimant, John H. Brown, was continuously engaged, in conjunction with said company, in the construction and testing of the type 5-inch gun and in other work under said contract, and during this period his time was reasonably worth $300 per month.

30 Also during one year of said period of eighteen months he was assisted in his work by one George L. Sheriff, who was paid by the claimants a salary of $100 per month.

Said Brown and Munsell also rented an office in New York at

$850 a year, 9/10 of the use of which for a period of 18 months was devoted to the furtherance of this contract.

They also employed a stenographer for the same period in said office at a salary of $700 a year, and a bookkeeper at $1,200 a year, 9/10 of whose services were devoted to work on this contract.

They also incurred and paid traveling expenses in and about the performance of the contract, amounting to $950.

They also expended $500 for miscellaneous office expenses, such as telephone, telegraph, postage, stationery, etc., in and about the performance of this contract.

They also paid Colonel J. M. Ingalls $283.75 for his investigations referred to in Finding VI.

They also paid Professors Denton and Webb for their investigations, referred to in said Finding VI, the sum of $600.

The office in New York was under the charge of Harvey M. Munsell, who conducted most of the correspondence in connection with this contract, which occupied his time for the period of 18 months hereinbefore stated, during which period his time was reasonably worth $250 a month.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein be, and the same is hereby, dismissed.

VI. *Opinion.*

Barney, Judge, delivered the opinion of the court:

On the 18th of May, 1898, the plaintiff entered into a contract with the Government to manufacture for the use of the Ordnance Department of the Army 50 segmental, tube wire-bound rapid-fire guns, of which the claimant, Brown, was the inventor, together with Navy rapid-fire gun mounts for the same. Twenty-five of these guns were to be of 5-inch and 25 of 6-inch caliber. The twenty-five 5-inch guns were to be paid for at $9,175 each, and the twenty-five 6-inch guns at $10,950 each, making a total contract price of $503,125.

The contract was subsequently annulled by the Government before any of the guns had been delivered. This suit is brought to recover the sum of $140,502.95, the amount alleged to have been expended toward the performance of the contract before its annulment. Of this sum $42,578.18 is alleged to have been expended by the plaintiff, and the remainder by the Diamond Drill and Machine Co., the subcontractor at whose works the guns were to be manufactured for the fulfillment of the contract.

None of the guns ever having been delivered under this contract, as before stated, the question for decision in this case is whether the contract was ever legally annulled by the Government.

The contract provided that a sample gun of both calibers should be furnished by the plaintiffs and submitted to test, and that the

acceptance of the guns by the Government would depend
31 upon such test proving satisfactory. The clauses of the contract relating to this subject are as follows:

"The first gun manufactured will be fired with full service charges of powder, such as that used in testing other rapid-fire guns of similar caliber, and with not more than the regular service pressures for endurance, and the gun must be fired for endurance 300 rounds or less as rapidly as practicable at the proving grounds of the manufacturers, commencing as soon as the gun is completed and continue firing as the department may require, 5 rounds to be fired with pressures of about 45,000 pounds, and shall not exceed 50,000 pounds, these to be included in but at close of the test, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily.

"The first gun made of the other caliber to be tested at the same place and passed upon in the same manner, without any unnecessary delay, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily.

"Both gun and carriage must endure these tests in all respects satisfactorily, both as to the strength of material and facility of operation.

* * * * * * *

"The work must pass the required inspection at all stages of its progress, and shall be inspected and passed upon at all times without any unnecessary delay, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States."

The first complete gun with mount, etc., was to be delivered for test within three months from the date of the contract, but several delays had been granted by the Government, so that the first gun was not tested till March 8, 1899. The test was made under the inspection of Capt. Ira MacNutt of the Ordnance Office on proving grounds provided by said Diamond Drill & Machine Co., near the company's plant at Birdsboro, Pa. It is considered unnecessary to state here in detail just what occurred during this test, and it is only necessary to say that the findings show that while the gun passed some of the requirements satisfactorily, in others it did not. The breech bushing and jacket of the gun were cracked, the diameter of the gun fluctuated, there being both increases and decreases, changes in the cross-section of the bore from a round to an elliptical form, and other defects were disclosed as shown particularly in the findings.

These features disclosed by the test created an apprehension on the part of the ordnance officers of danger of rupture, and the Chief of Ordnance and the Secretary of War refused to accept the gun unless it was subjected to and would satisfactorily pass a further test of 100 rounds. In October, 1899, the claimants had a conversation with Maj. Smith, who had immediate charge of matters under this contract, in which he informed them that the gun appeared to have passed the test and that they could go on with the completion of the contract. Shortly after the plaintiffs wrote the Chief of Ordnance informing him of this conversation and requesting an official letter

to the same effect. No response was made to this request. November 9, 1899, the Chief of Ordnance submitted to the Secretary of War the report of Capt. MacNutt on the test of the gun with an official indorsement thereon, stating in substance that while the gun
32 apparently had met the contract requirements certain defects had developed during the test which should be remedied before acceptance, and suggesting that the gun be submitted to 100 additional rounds, and that the guns be modified so as to remedy these and any further defects which might be developed in these additional firings. This indorsement was approved by the Secretary of War November 31, 1899, and pursuant thereto on February 6, 1900, the plaintiffs were notified of this action. On February 9, 1900, the claimants wrote the Secretary of War asking that further action in the premises be suspended until they could be heard and stating that they had not assented to any modifications of the gun and objecting to the further test recommended as above stated.

On May 16, 1899, while the construction of the type gun was in progress, the plaintiffs had been requested by the Chief of Ordnance to present to him some mathematical calculations in reference to the qualities of the gun. Nothing was done in the matter by the plaintiffs until after the receipt by them of the above notification of February 6, 1900, but on February 17, 1900, they wrote the Chief of Ordnance, apparently in response to the above request, requesting the selection of a board to make the calculations requested, naming two members themselves and suggesting the name of Maj. Ingalls, of the War Department, as the third member of the board. The War Department acceded to this request, and Maj. Ingalls was assigned to said duty. The said board was practically a year in making their investigations, at the close of which they made their report to the claimants, but not until after the annulment of the contract, as hereinafter stated. This report was on the whole favorable to the gun, but material defects were pointed out and modifications suggested.

On January 11, 1901, the Chief of Ordnance returned Capt. MacNutt's report on the test of the gun to the Secretary of War, with an indorsement recommending that his office be authorized to declare the claimant's contract null and void because of the claimants having failed "to comply with the requirements of the Secretary of War and in further accordance with the provisions of the contract." This recommendation was approved by the Secretary of War and the contract was annulled. The claimants appealed from this decision to the Secretary of War, but he refused to revoke this annulment.

It is contended by the claimants that the type gun successfully passed the test required by the contract, as shown by the facts connected with said test, as well as by the statements and reports of those officers of the War Department who had that question to decide. It will be seen that the test of this gun was made in accordance with the terms of the contract as to the number of rounds fired, the amount of pressure, etc., and while the Chief of Ordnance in his report to the Secretary of War said that the guns "apparently met the contract requirements," he said in the same report that a further test should be made to prove the gun satisfactory. This report is doubtless a

little loose in expression, but it must be interpreted as a whole, and so interpreted shows that the gun was not in every respect satisfactory to this officer.

It may be well to pause here and discuss briefly to what officer of the War Department this gun must prove satisfactory and what latitude of discretion such officer would have in the premises. While the contract seems to be silent as to what officer should
33 exercise this discretion, the parties seem to have interpreted it as leaving that subject to the Chief of Ordnance, and that is doubtless the way in which it should be construed, subject, however, perhaps to the Secretary of War, which question will be noticed later. The contract provided that the gun must pass "its test satisfactorily." This of course did not mean satisfactorily to Maj. Smith, or any other subordinate of the War Department, but satisfactorily to the highest authority if finally submitted to such authority.

An important question to be decided in this case is what effect should be given to the word "satisfactorily" as used in the contract in question. The contract provided in considerable detail the manner in which this test should be conducted, and then said that the gun should pass this test "satisfactorily." Under the familiar rule in the construction of contracts some effect and meaning must be given to this word if not inconsistent with other provisions. It seems to us evident that it meant that the gun was not only to pass successfully through the ordeal to which it was to be subjected to the extent of being able to live through the 300 rounds and withstand the pressure to which it was to be called upon to endure, but, in addition to that, its conduct during this test and its condition afterwards must be such as to be satisfactory to the proper officers of the Government. This does not signify that it could be rejected on account of mere caprice or for other cause without just and reasonable foundation. If the gun passed through the test in reasonable compliance with the contract, it was the contract duty of the Government, to accept it. Electric Lighting Co. v. Elder Bros., 115 Ala., 138; Greenberg v. Lumb, 129 N. Y. Supp., 182; Fechteler v. Whittemore, 205 Mass., 6; Exhaust Ventilator Co. v. Ry. Co., 66 Wis., 218.

As was said in Electric Lighting Co. v. Elder Bros., supra, "In a case like the present one the party can not capriciously refuse to accept the work. He must be in good faith dissatisfied. He can not avoid liability by merely alleging that he is dissatisfied; he is bound to be satisfied when he has no reason to be dissatisfied; he must fairly and honestly test the work, exercising such judgment and capacity as he has. The dissatisfaction must not be capricious nor mercenary, nor result from a design to be dissatisfied; it must exist as a fact; it must be actual, not feigned; real, not merely a pretext to escape liability." (Id., 153.)

In Greenberg v. Lumb, supra, the defendant had contracted to do certain work in a "satisfactory manner," and in construing this phrase the court tersely said: "It was only bound to do the work in a manner that ought to satisfy." It is unnecessary to say that we

are not now discussing that class of cases where the acceptance of work performed under a contract is peculiarly a matter of fancy or taste and where a different rule prevails.

Of course the question of the passing of the test of the type gun had to be left to some one, and by the construction given to the contract this question was left to the Chief of Ordnance, and we do not think that the facts in the case show that he exercised this judgment in a capricious or unreasonable manner. In fact his judgment is in a measure confirmed by the report of the board which was practically selected by the claimants, for while reporting generally in favor of the gun they suggested certain necessary modifications in its construction. It follows from the foregoing that the
34 Chief of Ordnance properly and rightfully required a test in addition to the one specified in the contract before approving the gun. The gun not having proved satisfactory under the first test, under the rule as stated he doubtless had the right at that time to reject it altogether. He did not do this, but gave the claimants an opportunity for an additional test de hors the contract to prove the gun satisfactory. This was a favor to the claimants and one which he doubtless had the right to grant, and it became their duty to submit the gun to this further test or to have the gun rejected and the contract annulled.

As to the contention by the claimants that the officers of the War Department were guilty of bad faith during the initial performance of the contract in question, and particularly in its annulment, it is sufficient to say that we find nothing in the record which justifies us in coming to any such conclusion.

It is contended by the defendants that by the terms of the contract the decision of the Secretary of War on the appeal to him made by the claimants from the decision of the Chief of Ordnance was a finality and can not be questioned here. This contention is based upon the following provision of the contract:

"If any doubts or disputes arise as to the meaning of anything in this or any of the papers hereunto attached and forming this contract, the matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final."

We think any provision of a contract making the decision of any officer final should receive a strict construction, and by applying that rule to the clause quoted we do not think it should receive the construction asked for by the defendants. That provision relates in terms to the interpretation of the contract, and doubtless could have been invoked if any question had arisen as to the kind of test required by the contract. But upon the broader question as to whether the gun had passed this test satisfactorily we do not think this clause has any application.

To sum up the whole case in a few words, we think the findings show that the Chief of Ordnance was justified in his action in requiring an additional test of the type gun, and the claimants not

having complied with this requirement that the contract was properly annulled.

It follows from the foregoing that an order will be entered herein dismissing the petition.

All concur.

35 VII. *Judgment.*

JOHN HAMILTON BROWN, Surviving Claimant of John H. Brown & Harvey M. Munsell, Trustees,
v.
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 6th day of December, 1915, judgment was ordered to be entered as follows:

The Court on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of John Hamilton Brown, Surviving Claimant of John H. Brown & Harvey M. Munsell, Trustees, be, and the same is hereby, dismissed.

BY THE COURT.

36 VIII. *Application for Appeal.*

In the Court of Claims.

No. 29949.

JOHN HAMILTON BROWN, Surviving Claimant of John H. Brown & Harvey M. Munsell, Trustees,
v.
THE UNITED STATES.

From the judgment rendered in this cause on the 6th day of December, 1915, the claimant John H. Brown, by his attorney of record, makes application for and gives notice of, an appeal to the Supreme Court of the United States.

GEORGE H. LAMAR,
Attorney of Record.
GEORGE A. KING,
Of Counsel.

Presented in open Court Feb. 10, 1916.

Whereupon it was ordered that the appeal be allowed as prayed for.

BY THE COURT.

37 In the Court of Claims.

No. 29949.

JOHN HAMILTON BROWN, Surviving Claimant of John H. Brown & Harvey M. Munsell, Trustees,

v.

THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, opinion, of the judgment of the court, of the application of the claimant for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the seal of the Court of Claims this 11th day of February A. D. 1916.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk, Court of Claims.

Endorsed on cover: File No. 25,128. Court of Claims. Term No. 845. John Hamilton Brown, surviving claimant of John H. Brown and Harvey M. Munsell, trustees, appellant, vs. The United States. Filed February 12th, 1916. File No. 25,128.

Supreme Court of the United States

October Term, 1917

No. 93

Oliver B. Bamford, Administrator of John Hamilton Brown, Surviving Claimant of John H. Brown and Harry H. Mitchell, Trustee, *Appellant*,

v.

The United States.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

GEORGE H. LAMAR,
GEORGE A. KING,
Attorneys for Appellant.

Table of Contents.

List of Cases Cited.

IN THE

Supreme Court of the United States.

October Term, 1917.

OLIVER B. SAALFIELD, administrator of JOHN HAMILTON BROWN, surviving claimant of JOHN H. BROWN and HARVEY M. MUNSELL, Trustees, *Appellant*,
v.
THE UNITED STATES, *Appellee*.

No. 101.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

I. Statement of the Case.

The case is presented upon appeal from the final judgment (rec. 27) of the Court of Claims of December 6, 1915, dismissing the petition by which the suit was initiated on January 7, 1907, in that court based upon a government contract (rec. pp. 8–12) as executed in the early part of the Spanish-American War.

This was a suit brought by John Hamilton Brown and Harvey M. Munsell, for the recovery of the actual expenditures incurred under the contract entered into May 18, 1898, with the United States, represented by the Chief of Ordnance of the Army, for fifty Brown segmental tube wire wound rapid-fire guns. By the terms of the contract (rec. pp. 8–12) twenty-five of these guns were to be of five-inch caliber at a price of $9,175 each

and twenty-five of six-inch caliber at $10,950 each. The contract price of all the guns furnished under the contract would thus be $503,125.

The basic purpose of the contract, a copy of which, with notations of extensions thereof constitute Exhibit A (rec. 8–12) to the petition, was to obtain a gun of the type described which would supply a muzzle velocity of twenty-six hundred foot seconds. In addition to such muzzle velocity, the contract specified the length of bore and other particulars. The material was to be open to inspection by the Ordnance Department at all stages of manufacture. The following provisions were made with reference to test (rec. pp. 9, 10):

"The first gun manufactured will be fired with full service charges of powder, such as that used in testing other rapid-fire guns of similar caliber, and with not more than the regular service pressures for endurance, and the gun must be fired for endurance 300 rounds or less as rapidly as practicable at the proving grounds of the manufacturers, commencing as soon as the gun is completed and continue firing as the Department may require, 5 rounds to be fired with pressure of about 45,000 pounds, and shall not exceed 50,000 pounds, these to be included in but at close of the test, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily.

"The first gun made of the other caliber to be tested at the same place and passed upon in the same manner, without any unnecessary delay, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily.

"Both gun and carriage must endure these tests in all respects satisfactorily, both as to the strength of material and facility of operation."

Also (rec. p. 10):

"It is stipulated and agreed that the party of the first part shall deliver for test the first complete gun with

mount, etc., within three months from the date of execution of this contract, and as soon as tested and approved (and it shall be tested and passed upon without delay as soon as completed) four guns with mounts, etc. (subject to 5 usual proof rounds in the usual way), every month after receiving notification that the test is satisfactory are to be delivered, until the whole number contracted for are made and delivered to the Government f. o. b. at the place of manufacture."

The following provisions were also made (rec. pp. 11, 12):

"The work must pass the required inspection at all stages of its progress, and shall be inspected and passed upon at all times without any unnecessary delay, and be approved by the officers of the Ordnance Department before being accepted and paid for by the United States.

"Payment to be made on each gun with carriage and accessories after acceptance.

"If any doubts or disputes arise as to the meaning of anything in this or any of the papers hereunto attached and forming this contract, the matter shall be at once referred to the Chief of Ordnance, U. S. Army, for determination. If, however, the party of the first part shall feel aggrieved at any decision of the Chief of Ordnance, it shall have the right to submit the same to the Secretary of War, and his decision shall be final.

"2d. All the guns, etc., herein contracted for shall be delivered by the said parties of the first part as aforementioned.

* * * * * * *

"4th. For the guns, etc., herein contracted for, which shall be delivered, inspected, and accepted as aforesaid, there shall be paid by the United States to the said parties of the first part, on bills in duplicate, made in approved form, and duly authenticated by the proper officers of the Ordnance Department, the prices aforementioned in the funds furnished for the purpose by the United States."

Among the averments of the petition are the following (rec. 5–7):

"5. The claimants, under and pursuant to said contract, proceeded with the manufacture of the guns, and tendered one type gun of five-inch calibre, which was mounted as prescribed by the contract and specified by the defendants, and the same was subjected to a test on the part of the proper authorities of the United States, who proceeded to, and did, make a thorough and severe and extraordinary test, firing the same with smokeless powder, the specified maximum of three hundred times, which resulted in an average muzzle velocity in excess of the contract requirements, and which test more than met the requirements of the contract in all respects.

"6. The claimants further represent that, at a later date after long delay, the Chief of Ordnance made, under date of November 3, 1899, an indorsement upon the report of the United States inspector who conducted said test, in which indorsement the Chief of Ordnance stated:

"'In the opinion of this office, while the type five-inch gun is not deemed as satisfactory a gun as is desirable for service, yet its test has apparently met the contract requirements.'

"7. The claimants further say that the suggestion of the Chief of Ordnance, as the claimants aver on information and belief, was not adverse to the gun as manufactured and tested, but to the type of gun provided for in said contract of May 18, 1898, and that, notwithstanding the said contract, whereby the type of gun to be made had been settled upon and determined between the United States and these claimants, and, notwithstanding the unusually severe test and the fact that the gun had, according to his own admission, apparently met the contract requirements, the Chief of Ordnance then called upon these claimants to allow the said gun to be fired 100 additional rounds and at higher pressures than those provided for in the contract, which, after mature consideration, these claimants found that they could not accede to.

"8. That thereafter there was further consultation between these claimants and the Chief of Ordnance, resulting in an expression by the latter of a desire for theoretical calculations concerning the mechanical strength of this

system of gun construction, and a request to furnish theoretical calculations which would enable the Ordnance Office to better understand the conditions of strain and resistance set up in this type of gun during high-pressure firing.

"9. That upon this suggestion, and with the consent of the Chief of Ordnance, Professor J. E. Denton and Professor J. B. Webb, both of the Stevens Institute of Hoboken, N. J., were employed by these claimants to make the desired calculations, together with Major James M. Ingalls, Artillery Corps, U. S. A., who was designated by the Secretary of War, February 19, 1900.

"10. That the character of the investigations were largely original in character, owing to the novelty of the method of construction, and the same were carried on in a painstaking manner; and it was not until January, 1901, that said experts completed their reports, which were voluminous and thorough, and which were extremely favorable to this method of gun construction.

"11. That the Chief of Ordnance, having been informed, or having reason to believe, as the claimants are informed and believe, that said report was ready and about to be delivered and was favorable to the system of gun construction involved in this contract, and without any notice to the claimants of his purpose so to do, and without specifically calling to the attention of the Secretary of War the practical suspension pending said investigation and report, submitted to the Secretary of War, in the form of a sixth indorsement upon the report of the test, a recommendation for authority to inform the claimants that, by reason of their failure to submit to the aforesaid additional test, unauthorized by the contract and referred to in Par. 7 of this petition, 'said contract is declared to be null and void;' and thereafter, promptly upon the approval of said recommendation by the Secretary of War, to wit, on January 17, 1901, the Chief of Ordnance wrote a letter to these claimants, notifying them that they had not furnished an acceptable gun and that their contract was annulled. Said annulment of said contract was not made and taken in good faith, but under a mistake so gross as to justify an inference of bad faith.

"12. That thereafter these claimants, in writing and orally, protested against said annulment of the contract of the Chief of Ordnance and to the Secretary of War, but without effect.

"13. That the claimants aver that, by reason of the breach or breaches of the said contract of May 18, 1898, by and on the part of the United States Government, great wrong and injury and damage have been inflicted upon the claimants, and for which they claim compensation to the amount of the expenditures made, or caused to be made by them in this behalf, with interest, for the use and benefit of those concerned, as their respective interests may appear."

Upon the record as made up by the parties to the cause, the case was duly presented to the court below and, on December 6, 1915, there were handed down its findings of fact and conclusion of law thereon, supported by an opinion, as reported in 51 C. Cls. pp. 22–35, and which may also be found in the record in this court, pp. 14 to 27, inclusive.

By successive indorsements on the contract, the time for the completion of the first, or type, gun was extended to March 15, 1899 (Finding I, p. 15), prior to which time, to wit, about March 8, 1899, the same was completed and tendered for test (Finding I, last par. rec. p. 15).

The opening paragraph of Finding III, p. 15, reads as follows:

"It was arranged between the Chief of Ordnance and the claimants that 'The 6-inch-type gun will not be submitted for test until after all the 5-inch guns, or nearly all, have been completed.'"

The findings contain a full account of the test of this type 5-inch gun (Finding III, pp. 15–17). The test was completed August 9, 1899.

The test is described in Finding III (rec. pp. 15–17). The test firing began with a pressure of 18,000 pounds per square inch, which was raised on the second round to 21,050 pounds, and on the third round to 32,800 pounds, with a muzzle velocity of 2,705 feet per second, and on the fourth round to 35,750 pounds pressure, with a muzzle velocity of 2,821 feet per second, on which round the carriage was injured, it not being strong enough to stand such high muzzle velocities.

At this stage of the test the claimants, agreeably to the terms of the contract making the Chief of Ordnance the arbiter as to its meaning, appealed to this official in the form of protest against increases being made in the powder charge and insisted that any charge that was sufficient to produce a muzzle velocity of 2,600 feet per second was all that was required by the contract, except for the five high pressure rounds required at the close of the test; and "this question was * * * decided in favor of the claimants" (Finding III, p. 16; see contract, rec. top p. 10).

Thereafter the powder charge was so adapted as to give this muzzle velocity of 2,600 feet per second as a general rule, except in the said five high-pressure rounds towards the close of the test, which were fired with pressures of between 45,000 and 50,000 pounds per square inch. On one of these high pressure rounds, the 293d, the breech bushing jacket of the gun was cracked and the breech could not be opened by hand.

These breaks were repaired, but the mechanism repaired did not operate satisfactorily thereafter.

The gun was star-gauged by the government inspector about every 50 rounds during the test. These gaugings at different times throughout the test and at different points in the bore, indicated varying and shifting changes, involving slight increases and decreases, in the

diameters of different cross-sections of the bore, the gauging at several times and places indicating a reduction of the diameter of 5 inches to the extent of 1-100 of an inch, or down to 4.99 inches. As a precaution against any possible danger of rupture or explosion of the gun by any reduction of the bore sufficient to cause the projectile to stick in the bore when the gun was fired, an iron plug of the diameter of the projectile was passed through the bore about every 10 or 12 rounds, on one of which occasions, about the 100th round, it stuck in the bore so tight at one point as to require the efforts of three men to force it through with a pole.

At all times with this exception, the plug passed through freely.

These reductions and variations in the diameter of the bore of the gun were to some extent due to deposits of metal on the walls of the bore by abrasion from the projectile in its passage from the gun, but were principally due to these slight changes in the cross-section of the bore from a round to an elliptical form, resulting from a shifting of the segments enveloping the liner tube by the explosion of the charge, and also to an actual contraction of the bore by the compression of the liner tube forming the walls of the bore by the elastic tension of the wire with which the tube and its enveloping segments were wound and bound together, which tension, with the further increase therein resulting from the explosion of the charge upon reaction after the explosion, exercised a compressing effect upon the liner tube (rec. near foot p. 16).

In large guns of ordinary types of construction there is usually a slight contraction of bore during the first few rounds of firing, after which the gun settles down to a new condition, and thereafter the changes of bore diameter in such ordinary type gun are almost entirely in

the way of increase of diameter from erosion and abrasion.

While the variations and reductions in the diameter of the bore of the contract type gun indicated by the star-gauging during the firing test did not quite reach a point of actual danger to the gun from rupture or explosion by sticking of the projectile in the bore in the process of firing, they did reach the limit of safety in this respect, and created a reasonable apprehension of danger in the minds of the Chief of Ordnance and other officials of the War Department connected with the execution of the contract for the guns, and caused the Chief of Ordnance and the Secretary of War to refuse to pass and accept the type gun unless it should satisfactorily pass a further test of 100 rounds additional to the maximum of 300 rounds specified in the contract, as proposed and recommended by the Chief of Ordnance in his indorsement of November 3, 1899, hereinafter set forth. This apprehension was heightened by the fact of the new and comparatively untried type of construction of the gun, and by its reversal of the usual behavior of guns of the ordinary type of construction in the way of its continued slight contractions and changes of bore in the course of extended use (rec. pp. 16, 17).

Continuing the narration, we quote from the language of the Court of Claims itself as contained in its findings as follows (pp. 17–20):

"IV. Following the completion of the test of the type gun on August 9, 1899, the claimants applied personally to the Ordnance Office for official action on the test, and at different times discussed the test and the matter of official action thereon with Maj. Charles S. Smith, who, being in charge of the division of guns, powder, and projectiles, had immediate supervision of the test. In the course of their conversations with Maj. Smith it was conceded that certain modifications in the construction of

the gun were advisable and would be made in any succeeding guns that might be constructed under the contract.

"Toward the latter part of October, 1899, the claimants again called at the Ordnance Office and asked the result of the test of the gun. Maj. Smith said, 'It appears to have passed'; whereupon Munsell replied, 'Yes, it does; and we can go on with the completion of the guns?' to which Maj. Smith replied, 'Yes.'

"Shortly after the above conversation with Maj. Smith the claimants, on November 3, 1899, wrote the Chief of Ordnance stating that they had been informed by Maj. Smith that the Ordnance Department had, after due deliberation, passed the type gun and its carriage, and requesting the Chief of Ordnance to write an official letter passing the gun and carriage, as it had then been nearly three months since the completion of the test, and they had as yet received no formal notification of the result of it. This letter was duly received at the Ordnance Office, and no response was made to said request of the claimants therein.

"On November 3, 1899, the Chief of Ordnance officially submitted to the Secretary of War the report of Capt. MacNutt, the inspecting officer, on the test of the gun with a 'First indorsement' and recommendation by the Chief of Ordnance thereon, as follows:

"'Respectfully submitted to the honorable Secretary of War for instructions.

"'A full history of the contract with the trustees of the Brown segmental tube-wire gun for 25 5-inch and 25 6-inch R. F. guns on their system with this department, and a brief of all correspondence relating thereto and of the record of test of the first, or type, 5-inch gun, is in the hands of the Secretary of War in the form of an unofficial memorandum, and which contains, it is believed, a full statement of the case.

"'In the opinion of this office, while the type 5-inch gun is not deemed as satisfactory a gun as is desirable for service, yet its test has apparently met the contract requirements, and if certain modifications in the gun and its carriage shall be made in their further manufacture

to remedy defects developed in the test, and in other respects be made to meet more fully the requirements of the department, to which propositions the company willingly agree, it is recommended that the 5-inch type gun and its mount be accepted, subject however, to the condition that, in view of the moderate pressures to which this gun has been subjected, the department fire it 100 additional rounds, or less, as it may deem expedient, with charges giving higher pressures and assimilating more nearly the pressures that would be experienced in actual service, and that in the further manufacture of the guns they shall be modified, at the expense of the company, so as to remedy any further defects that may be developed in these additional firings.'

"This indorsement and recommendation of the Chief of Ordnance was referred by the Secretary of War to the Chief of Engineers, by whom it was indorsed on November 30, 1899, and subsequently returned to the Secretary of War, by whom the indorsement and recommendation of the Chief of Ordnance was approved on January 31, 1900; and pursuant thereto Capt. McNutt, in compliance with instructions from the Chief of Ordnance, notified the claimants on February 6, 1900, of the decision and recommendation of the Chief of Ordnance and its approval by the Secretary of War. It was understood that the further test of one hundred additional rounds proposed by the Chief of Ordnance was to be carried out at the expense of the Government.

"V. On January 22, 1900, while the said recommendation of the Chief of Ordnance of November 3, 1899, was pending in the office of the Secretary of War, Tracy, Boardman & Platt, attorneys at law, of New York, wrote the Secretary of War that they had been retained as counsel by the claimants in the matter of certain modifications in the guns in question, as to which they understood a question was then pending in the War Department, upon which they asked an opportunity to be heard before it was considered and decided by the department. This letter was referred to the Chief of Ordnance, who, on January 27, 1900, indorsed thereon a statement of the status of the case, and on January 31, 1900, the Secretary

of War wrote said attorneys that it did not appear that there was pending before the department any question in relation to the contract referred to.

"On February 9, 1900, the claimants wrote the Secretary of War renewing their application that further action be suspended until they could be heard in the matter, and stating that they had not as yet assented to any modification of the gun and carriage and that they had not been informed in any precise and definite manner what those proposed modifications were except in reference to the carriage, and that they could not understand upon what principle the type gun was to be subjected to a further test of one hundred additional rounds with charges giving higher pressures.

"VI. On May 16, 1899, it was suggested to the claimants that they present to the Ordnance Office, to be presented to the Chief of Ordnance, the mathematical computations and engineering considerations upon which their claims of strength of construction and other qualities of their gun were based, the Ordnance Office never having been furnished such information. Nothing was done by the claimants, however, in the matter until after their official notification on February 6, 1900, of the War Department's action on the test of the type gun, when, after conferring with the Chief of Ordnance in the matter, they, on February 17, 1900, wrote the Chief of Ordnance as follows:

"'In pursuance of the suggestions of Maj. Smith and yourself we have employed Professor Denton, of Stevens Institute at Hoboken, N. J., as an expert to work out the various problems connected with the construction of the 5-inch Brown segmental tube-wire gun.

"'At Prof. Denton's request, we have also employed and associated with him in our work Mr. Webb, professor of mathematics in the Stevens Institute. It will be necessary, however, for these gentlemen to have some technical assistance in their work, and it has therefore been suggested that it will be of the greatest benefit if an officer of practical experience with artillery could be connected with them in the work. Of course we should expect to make proper compensation to any officer so employed, as

it will only occupy time when he would otherwise be at leisure. If this plan should commend itself to you, we would suggest Maj. James M. Ingalls as one whose ability and experience would qualify him for the work in a high degree. We have had some communication with Maj. Ingalls on the subject, and he has expressed his willingness to make such an arrangement, provided that it meets with the approval of the department and yourself. Hoping this suggestion will receive your favorable consideration, we are, with great respect, etc.'

"On February 19, 1900, the Chief of Ordnance submitted this letter to the Secretary of War, with the following indorsement:

"'As this office had no information as to the mathematical basis on which the Brown segmental 5-inch and 6-inch wire guns were being built, and the company was unable to furnish it, it was suggested to the trustees by this office last spring that they employ a competent person to investigate the matter and demonstrate analytically that the claims of the company respecting the merits of their system were well founded, as well as to determine theoretically the best tensions to be employed in applying the wire. The within letter is the outcome of the suggestion made at that time by the department. I would therefore respectfully recommend that the within request be approved and that Maj. Ingalls be authorized to render the assistance desired by them if it can be done without interfering with the discharge of his regular duties.'

"On the same date, February 19, 1900, this indorsement and recommendation of the Chief of Ordnance was approved by the Secretary of War.

"The said Denton, Webb, and Ingalls first went to Birdsboro, Pa., and there inspected and examined the gun. The claimant, Brown, went repeatedly to the Stevens Institute of Technology at Hoboken, N. J., with models, plans and charts, which he furnished to Prof. Denton, and also gave Ingalls data in regard to the firing of the gun.

"The said Denton, Webb, and Ingalls, upon being employed by the claimants, extended their investigations over a period of practically a year, at the close of which reports were made by them to the claimants, but not,

however, until after the annulment of their contract by the Chief of Ordnance, as hereinafter set forth.

"These reports were, upon the whole, favorable to the style of construction of the gun; but defects of construction were pointed out and remedies therefor suggested in the way of modifications in the construction.

"VII. On January 11, 1901, after the notification of the claimants of the department's action on the test of the type gun, and having received no acceptance from the claimants of the department's official proposition therein for a further test of 100 additional rounds, and for modifications to overcome defects in the gun which had been, and which might further be, developed in the test firing, the Chief of Ordnance returned Capt. MacNutt's report on the test, with the prior indorsements thereon, to the Secretary of War with a sixth indorsement recommending that his office be authorized to declare the claimant's said contract null and void because of the claimants having failed 'to comply with the requirements of the Secretary of War and in further accordance with the provisions of the contract.' This recommendation was approved by the Secretary of War; and thereupon, on the 17th day of January, 1901, the Chief of Ordnance wrote the claimants that, as they had up to that time failed to deliver an acceptable gun, their contract was thereby declared null and void."

Against this action the contractors made protest.

Finding VIII (rec. pp. 21, 22) shows the following damages sustained by the contractors and their subcontractors, the Diamond Drill & Machine Co., now the Birdsboro Steel Foundry & Machine Company, the nature of whose contract is set forth in Finding II (rec. p. 15).

BY THE SUBCONTRACTORS.

Special machinery	$10,474.46
Proving grounds	2,715.36
Damages to property	323.35
Cost of material purchased and work done in construction of guns and mounts, and now of little or no value	66,130.86
Total expenditures of the Diamond Drill & Machine Co., subcontractors	$79,644.03

"Of the above expenditures, $7,263.33 were made and paid by the Diamond Drill & Machine Co., subsequent to October 1899" (rec. p. 21). That is, this amount was expended after the date of the conversation detailed in Finding IV (p. 17), with Major Smith, chief of the division having charge of the subject, to the effect that the gun appeared to have passed its test and that the claimants might go on with their completion; and also subsequently to the letter of the claimants of November 3, 1899, placing on record in the office of the Chief of Ordnance the fact and their understanding of the oral notification of the official in immediate charge of the report on the test, and in the absence of any notification of any action or purpose to the contrary.

By the contractors, John Hamilton Brown and Harvey M. Munsell:

Time of John Hamilton Brown, 18 months at $300 a month	$5,400.00
Salary of George L. Sheriff, Assistant, 18 months at $100 a month	1,800.00
9-10 of rent of office in New York at $850 a year for 18 months	1,147.50
9-10 of salary of stenographer at $700 a year for 18 months	945.00
Travelling expenses incurred in and about performance of contract	950.00
Miscellaneous office expenses	500.00
Fee paid Col. J. M. Ingalls as expert	283.75
Fee paid Professors Denton and Webb as experts	600.00
Time of Harvey M. Munsell, contractor, for 18 months at $250 a month	4,500.00
Total expenditures of Brown and Munsell	$16,126.25
Total expenditures of contractors and subcontractors	$95,770.28

The claimants brought suit for the recovery of the expenditures made by the contractors and their subcontractors, the Diamond Drill & Machine Company, of Birdsboro, Pa., the name of which was afterwards changed to Birdsboro Steel Foundry & Machine Co., in and about the attempted performance of the contract.

The Court of Claims after finding the facts as above stated decided as a conclusion of law that the claimants were not entitled to recover and dismissed their petition. The opinion of the Court was delivered by Judge Barney. It is contained in this record (pp. 22–27), and is reported 51 C. Cls. 22–35.

Pending the prosecution of the suit in the Court of Claims the claimant, Harvey M. Munsell, died on the 19th day of February, 1913, and his death was duly suggested on the record (p. 1) and the cause proceeded in the name of John Hamilton Brown as survivor. Since this appeal was taken and docketed in this court, the claimant, John Hamilton Brown, died on the 25th day of July, 1916. His death was on the 16th day of October, 1916, duly suggested to this court and his administrator, Oliver B. Saalfield, substituted as appellant.

II. Assignment of Errors.

The appellant hereby assigns the following errors in the opinion and judgment of the Court of Claims:

1. By holding that, in the light of the facts found, the contract in suit was lawfully annulled by the appellee, acting through the Chief of Ordnance and the Secretary of War.

2. By holding that, under the facts and circumstances found, the appellant is not entitled to recover the amount of the expenditures made in carrying out said contract up to the time of such annulment, or to any part thereof.

3. By so construing the word "satisfactorily," as con-

tained in said contract, as to confer upon said officials the power to reject the character of article of manufacture contracted for, to exact from the contractor something not specified in the contract, to materially alter the criterion by which the product of manufacture was to be measured by means of a certain test definitely provided in the contract, and to so extend the severity of such test as to exceed the maximum limitation of firings therein specified.

4. By not holding that the delay occurring from August 9, 1899, when the test was completed, until January 31 and February 6, 1900, the respective dates of official action thereon by the Secretary of War and notice thereof to the claimants, constituted a breach by the government of its contract obligation to pass upon the work of manufacture with promptness and without unnecessary delay.

5. By not holding that the government was at least liable for the sum of $7,263.33, the actual amount of expenditures made toward the construction of the articles of manufacture between the time the claimants were informed by the officer of the War Department in immediate charge of the test that the type gun had passed the test and that claimants could "go on with the completion of the guns," and the time at which they were notified of the action by the Secretary of War placing certain conditions upon acceptance of the guns; and during the whole of which period no correction was made by the government of the statement to the claimants inducing such expenditures, although the Chief of Ordnance was promptly and officially notified thereof by mail at the time they were so advised by such officer of the Ordnance Office of the War Department.

6. By not holding that the concurrent action of the parties, as delineated in the findings referring certain questions of importance in the further manufacture of

the guns and the enlightenment of officials passing on their acceptance, to experts constituted such suspension of the contract or extension by the government of time provided therein as, in law, inhibited the exercise of any power which the officials of the War Department might otherwise have had to rescind or annul the contract until first relieving the suspension or again rendering time of the essence by giving notice to the claimants requiring performance on their part within a reasonable time, and specifying such time in such notice.

7. By holding that that the forfeiture of the contract declared by the United States deprived claimant of the right to recover for all breaches of the contract which had already occurred.

8. By not holding that, upon the facts found, the claimant was entitled to a judgment against the United States for the full amount of the labor expended and expenses incurred in or toward the performance of the contract by the claimants directly, or through their subcontractor, aggregating the sum of $95,770.28.

III. Brief of Argument.

The findings show the expenditure by the contractors and their subcontractors of the large sum of $95,770.28 in execution of their contract for 50 rapid fire guns, for which the total contract price was $503,125. For this great expenditure the government has not recompensed the contractors to the extent of a single dollar.

The present suit asks reimbursement to the simple extent of their expenditures, without a dollar of profit, and of course without interest.

It will be claimed in this brief on the part of the appellant:

A. That the type 5-inch gun tendered by the contrac-

tors and elaborately tested by the officers of the United States passed the test prescribed by the contract; that it was acknowledged by the officers of the United States, both orally and in writing, to have so passed; and that any requirements for a further test were unauthorized and in breach of the contract.

B. That in view of the provisions contained in the contract requiring prompt determination of the test, the government took an unreasonable time to render an official decision thereon; and the claimants were thereby released from any possible obligation to supply a more satisfactory gun.

C. That aside from the right to relief for all expenditures by reason of such breach, claimants were at least entitled to a judgment for $7,263.33, the amount of expenditures induced between the time at which they were advised by the government that the type gun had passed the test and claimants could "go on with the completion of the guns" and the date of the action of the Secretary of War placing a limitation upon the acceptance.

D. That when the contractors and the Chief of Ordnance arranged that a committee of experts were "to work out the various problems connected with the construction of the 5-inch Brown segmental tube-wire gun" (Finding VI, middle p. 19), the arrangement necessarily implied that time was no longer regarded as material; and it was a breach of contract for the War Department to annul the contract until the experts had made their report.

E. That no facts existed which warranted a summary annulment of the contract by the Chief of Ordnance and the Secretary of War.

F. That in any case specific notice was essential before the Secretary of War could be in position legally to exact a forfeiture.

The Gun Passed its Test.

The provision of the contract as to test is as follows (rec. pp. 9, 10):

"The first gun manufactured will be fired with full service charges of powder, such as that used in testing other rapid-fire guns of similar caliber, and with not more than the regular service pressures for endurance, and the gun must be fired for endurance 300 rounds or less as rapidly as practicable at the proving grounds of the manufacturers, commencing as soon as the gun is completed and continue firing as the Department may require, 5 rounds to be fired with pressures of about 45,000 pounds, and shall not exceed 50,000 pounds, these to be included in but at close of the test, and the acceptance of the remainder of the same caliber will depend upon the type gun passing its test satisfactorily."

The 300 rounds required by this provision were fired. The test was a most elaborate one. It began March 8, 1899, and continued to April 14 when it was suspended until June 30, 1899, in order that new proving grounds might be prepared. From that date it continued until the conclusion of the test August 9, 1899.

The only accident which occurred during this test upon which any stress is placed in the findings or opinion and the only one of which elaborate mention is made was a single occurrence as follows:

"During the course of the test the gun was star-gauged by the Government inspector about every 50 rounds, and these gaugings, at different times throughout the test and at different points in the bore, indicated varying and shifting changes, both increases and decreases, in the diameters of different cross-sections of the bore, the gauging at several times and places indicating a reduction of the normal diameter of 5 inches down to 4.99 inches; and as a precaution against the danger of rupture or explosion of the gun by a reduction of the bore sufficient to cause the projectile to stick in the bore when the gun was

fired an iron plug of the diameter of the projectile was passed through the bore about every 10 or 12 rounds, on one of which occasions, about the 100th round, it stuck in the bore so tight at one point as to require the efforts of three men to force it through with a pole.

"At all times, with this exception, the plug passed through freely.

"These reductions and variations in the diameter of the bore of the gun were to some extent due to deposits of metal on the walls of the bore by abrasion from the projectile in its passage from the gun, but were principally due to changes in the cross-section of the bore from a round to an elliptical form, resulting from a shifting of the segments enveloping the liner tube by the explosion of the charge, and also to an actual contraction of the bore by the compression of the liner tube forming the walls of the bore by the elastic tension of the wire with which the tube and its enveloping segments were wound and bound together, which tension, with the further increase therein resulting from the explosion of the charge upon reaction after the explosion, exercised a compressing effect upon the liner tube." (rec. p. 16.)

Did this trifling reduction of $\frac{1}{1000}$ of an inch in the diameter of the bore constitute any ground for rejection of the gun? It does not seem to have been so thought by the Chief of Ordnance, when on November 3, 1899, nearly three months after the completion of the test, he reported to the Secretary of War (Finding IV, rec. p. 18):

"In the opinion of this office, while the type 5-inch gun is not deemed as satisfactory a gun as is desirable for service, yet its test has apparently met the contract requirements," etc.

The statement that the test "has apparently met the contract requirements" conclusively shows that in the opinion of the office the terms of the contract had been met.

True, some further requirements were insisted upon,

but they seem to be entirely outside the terms of the contract. A condition is suggested "that in view of the moderate pressure to which this gun has been subjected, the department fire it 100 additional rounds, or less, as it may deem expedient, with charges giving higher pressures," etc. Also that "in the further manufacture of the guns they shall be modified, at the expense of the company, so as to remedy any further defects that may be developed in these additional firings."

The basic purpose of the contract, as construed by the Chief of Ordnance himself (rec. near top p. 16), was primarily to obtain a gun with a muzzle velocity of 2,600 foot seconds. The test, beyond question, demonstrated that this fundamental object had been attained in the product of manufacture.

By reference to the contract it will be seen that it was required (rec. top p. 10) that "the gun must be fired for endurance 300 rounds *or less*," etc. Five rounds are to be fired at high pressures, "these to be included in but at close of the test," etc.

If the firing was to be 300 rounds *or less* at certain pressures, with excessively high pressures *at the close of the test*, by what warrant can it be said that a further test could be required under the contract?

After this expression acknowledging that the contract requirements had been met it can not be claimed with success that they had not been met. True, some improvements not required by the contract were desired. The acts of the contractors show throughout this record their willingness to meet every reasonable desire of the Department in this respect.

Moreover, the contractors had a distinct official, even though oral, assurance that the contract requirements had been met. Toward the close of October, 1899, they called at the Ordnance Office of the War Department and asked

the result of the test. Major Smith, in charge of the division of guns, powder and projectiles, who had immediate supervision of the test, said to them:

"It appears to have passed." Whereupon Munsell, one of the contractors, replied, "Yes, it does; and we can go on with the completion of the guns?" to which Major Smith replied, "Yes."

"Shortly after the above conversation with Major Smith the claimants, on November 3, 1899, wrote the Chief of Ordnance stating that they had been informed by Major Smith that the Ordnance Department had, after due deliberation, passed the type gun and its carriage, and requesting the Chief of Ordnance to write an official letter passing the gun and carriage, as it had then been nearly three months since the completion of the test, and they had as yet received no formal notification of the result of it. This letter was duly received at the Ordnance Office, and no response was made to said request of the claimants therein." (Finding IV, p. 17).

Here, there was an inquiry of the officer at the head of the proper division in charge of this subject and a distinct assurance on his part that the gun had passed its test. It was immediately followed by a letter officially addressed to the Chief of Ordnance, containing an accurate statement of the substance of this conversation and requesting that it be officially confirmed and made a matter of record. Although the letter was duly received at the Ordnance Office no response whatever was made to it.

On the strength of the conversation with Major Smith and the uncontradicted letter of the claimants, both they and the subcontractors went on with their expenditures. Out of the large amount expended in furtherance of the contract, the substantial sum of $7,263.33 was expended by the subcontractors subsequently to the date of the conversation of October, 1899, and the letter of the contrac-

tors of November 3, 1899 (Finding VIII, two-thirds down p. 21 of record).

GOVERNMENT ESTOPPED TO DISPUTE EXPENDITURES AFTER NOVEMBER 1, 1899.

It is submitted that the silence of the proper officers of the United States estops the government from asserting that these expenditures should not be reimbursed when thus incurred on the faith of the assurance of authorized officers of the government that the gun had passed its test.

It is a case in which, as has been stated in regard to the silence of a contractor against the government—

"As the contractor was silent when he should have spoken, he can not be permitted to speak at the later period, in the altered condition of things, which then existed, as regards the other party." (*United States* v. *Shrewsbury*, 23 Wall. 508, 518.)

And in *Swain* v. *Seamens*, 9 Wall. 254, 274, it is said:

"Where a person tacitly encourages an act to be done, he can not afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claims."

If the officers of the Ordnance Department were constituted by the contract the arbitrators as to whether the gun had passed its test, they admitted and certified that it had so passed the test. True, they desired an additional test not specified in or authorized by the contract, and they wished some modifications made in the manufacture. Their opinion on this question, however, is not conclusive.

EFFECT OF EXTRANEOUS EXPRESSIONS.

In *Fowler* v. *Bushby*, 125 N. Y. Supp. 890, the contract provided that the architect's decision should be final. The architect wrote a letter stating that the items claimed by the contractor as extras were not included in the contract, but on other grounds expressed the opinion that the owner was not bound to pay for them. The court said (p. 893):

"The only part of this letter that deals with the question as to which the architect's decision was to be final under the contract is that which relates to 'the true construction and meaning of the drawings,' and as to that the decision is against the defendant; for he distinctly states that these matters were not included in the drawings and that plaintiff did not figure on them. The remaining portion of the letter deals with a construction of the contract, and amounts to nothing more than the gratuitous opinion of a layman, having no force or effect whatever."

In the present case the test which the gun is to pass is minutely prescribed by the contract. The gun had passed that test and yet the authorities of the War Department refused to accept it.

Authorities on Test of Machine.

The requirements of contracts of this character for the manufacture and sale of a machine to be tested as a preliminary to its acceptance have frequently been construed by the courts.

In *Pullman Car Company* v. *Metropolitan Railway*, 157 U. S. 94, a street railway at Kansas City ordered cars from a manufacturer at Chicago; the cars were to be furnished with brakes. After the delivery of the first lot, it was found that the brakes were not sufficient for use on the purchaser's road. The manufacturer expressed a

willingness to put the brakes in proper condition. The purchaser, however, undertook to rescind the contract, and refused to pay for the cars already delivered or take any more. This was held unjustifiable, and this court said (p. 111):

"We are of opinion that the demand of the defendant that plaintiff make the brakes sufficient, in connection with its expressed willingness prior to its notice of May 12 (no intimation being previously given of any desire or purpose to rescind the contract,) to approve the plaintiff's bill, as soon as the brakes were made sufficient for use on its road, and the expressed willingness of the plaintiff, after notice from the defendant that the brakes were insufficient, to put them in proper condition, (without claiming that it was under no legal obligation to incur expense to that end,) so far changed the relation of the parties to each other that the defendant lost the right if it had such right, to rescind the contract and return the cars; and the plaintiff must be held to have admitted or recognized its obligation to put the brakes in such condition that they would be adequate for use on the defendant's road."

This authority amply applies to the present case. The government lost the right to rescind the contract when, admitting that the type gun had passed its contract test, it insisted that modifications be made to meet its requirements. It broke the contract when, without informing the claimants or giving them any opportunity to know what modifications were desired, it arbitrarily rescinded the contract.

In *Seitz* v. *Brewers' Refrigerating Machine Company*, 141 U. S. 510, it was held that under a contract to constuct and supply a refrigerating machine, there was no warranty that the machine would produce any particular result; that the machine having been constructed and supplied in accordance with the contract, the purchaser was bound to pay the price.

In *Hinckley* v. *Pittsburg Steel Company*, 121 U. S. 264, a contract for the purchase of steel rails required the purchaser to give the manufacturer directions for drilling. The purchaser neglected and refused to give such directions until after the time for completion of the contract expired, and then refused to receive any rails. It was held that the failure to give drilling directions excused the manufacturer from performance and rendered the purchaser liable in damages for breach of the contract.

In *Andrews* v. *Hensler*, 6 Wall. 254, 258, it was said that where a purchaser contended that there were defects in the goods tendered, "the purchaser must use reasonable diligence to apprise his vendor of the defects alleged, and to make the tender."

In *Davis Calyx Drill Company* v. *Mallory*, 137 Fed. 332, there was a written contract for the manufacture and sale of a drill of a class specified in a trade catalogue. The vendee informed the vendor at the time of making the contract that the drill was wanted to bore holes through certain described strata in land in Lucas County, Iowa, and the manufacturer assured him that the drill in question would do this work as rapidly and economically as a diamond drill, but the written contract was silent upon this subject.

The Circuit Court of Appeals in an opinion by Judge Sanborn, held that no warranty of the article could be implied beyond the express stipulations of the contract. It said in the opinion (p. 338):

"The contract of the Calyx Drill Company in this case was expressed in writing. It was that it would make and deliver to the purchaser, Mallory, one class F3 drill, and certain other machines and articles, which were definitely specified in the contract. When it supplied these articles, it performed its agreement, whether they were suitable to perform the specific work of boring holes in the land controlled by the vendee in Lucas County, Iowa, or not."

It was held therefore that the contract had been performed by the manufacture and delivery of the exact article specified in the contract.

In *Mackay* v. *Dick*, Law Rep. 6 App. Cas 251, the contract was for the purchase of an excavating machine on condition that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the Carfin Railway Cutting. The machine was tested at another place and failed to excavate the required quantity. It was again tested at Carfin, but not on a properly opened-up face. The court held that neither test fulfilled the requirements of the contract, and as it was the business of the purchaser to provide the place for test under the contract, the purchaser was bound to keep and pay for the machine. This very simple statement of the effect of such a contract was made (p. 263):

"Both agree that the event of the testing was to be conclusive. If the machine did not answer the test, the Pursuers were to remove it before the end of February; if it did answer the test the Defender was to keep it and pay the agreed price."

In *Bliss Company* v. *U. S. Gaslight Company*, 149 N. Y. 300, the contract was for the manufacture of certain dies to be used in making gas burners. These dies were to be tested at the place of business of the manufacturer, and upon being found to satisfy the requirements of the contract, were to be paid for. The court said (pp. 305, 306):

"It would thus become the duty of the plaintiff, on completing the dies, to notify the defendant and give it an opportunity to inspect the goods at the place they were manufactured and determine whether they corresponded with the provisions of the contract. If so, it became the duty of the defendant to take them and pay therefor."

The dies having been made by the manufacturer, who notified the purchaser to call and examine and test them, and the purchaser having failed to do so, it was held that the manufacturer had done everything in his power to comply with the contract, and that the purchaser was in default and was bound to pay the price of the goods.

In *Curwin* v. *Quill*, 165 Mass. 373, a machine was to be built according to drawings. The court held that the machine having been built according to the drawings, the question whether it could do the work required of it or not was immaterial, that the contract had been performed and the manufacturer was entitled to recover the agreed price.

These cases illustrate the doctrine that after specified tests are prescribed for an article and it passes those tests the purchaser is obliged to accept and pay for it.

Unreasonable Time to Pass Upon Type Gun.

The contract required (rec. middle, p. 10) that the first complete gun with mount "shall be tested and passed upon without delay as soon as completed;" also (one-third down p. 11) that the work "shall be inspected and passed upon at all times without any unnecessary delay," etc.

The test was completed August 9, 1899. The claimants were orally informed at the Ordnance Office in the latter part of October, 1899, nearly three months later, that the gun had passed the test (Finding IV, two-thirds down p. 17). It was not until February 6, 1900, about six months after the close of the test, that they were informed that anything further would be required of them (end Finding IV, middle p. 18).

Meanwhile, the sub-contractors, who had at their own expense made the type gun, continued their expenditures on other guns and mounts. They spent over $7,000 after the date at which the contractors, Brown and Munsell,

had had their interview in the latter part of October, 1899, with the Chief of Division of the Ordnance Office, at which they were informed that the gun had passed its test.

Repeated provisions of the contract required the gun to be tested and passed upon without unnecessary delay. The contractors were assured upon a personal call at the Bureau that the gun had so passed. They wrote the Chief of Ordnance a letter truthfully quoting their conversation with the Chief of Division and asking the Bureau Chief to confirm it and make it a matter of record. Nearly three months went by, during which they continued to spend money in performance of the contract.

Gun Recognized as Having Passed Test.

Here we have a number of distinct circumstances to warrant the claim that this gun was recognized as passing its test:

(*a*) The claimants called at the Ordnance Office, War Department, and conferred with the chief of the division having charge of the matter, not, be it remembered, a mere subordinate, but a commissioned officer of the Ordnance Department of the Army, in responsible charge of the subject, now a brigadier-general on the retired list of the Army (Army Register, 1916, p. 555), and were distinctly assured by that officer in the course of the interview that the gun appeared to have passed its test and that the contractors might go on with the completion of the guns (Finding IV, 2d Par., rec, two-thirds down p. 17).

This assurance was so positive and distinct that the sub-contractors went on and spent over $7,000, subsequently to this date, toward the completion of the work of manufacture (Finding VIII, two-thirds down p. 21).

(*b*) Immediately after this conversation the contractors wrote the Chief of Ordnance, accurately reciting the conversation and asking the Chief of Ordnance to give them an official notification in accordance therewith. In other words, to make the oral notice of passage of the test a matter of record. To this letter no response was made (Finding IV, rec. near foot p. 17).

(*c*) November 3, 1899, the Chief of Ordnance wrote the Secretary of War (Finding IV, rec. one-third down p. 18):

"In the opinion of this office, while the type 5-inch gun is not deemed as satisfactory a gun as is desirable for service, yet its test has apparently met the contract requirements," etc.

No action was taken by the Secretary of War on this recommendation until January 31, 1900, or about three months later (last Par. Finding IV, middle p. 18). His action, which constituted in effect a decision of compliance with the contract and an acceptance conditional upon compliance with certain non-contract requirements, was communicated to the claimants February 6, 1900 (last Par. Finding IV, middle p. 18). In other words, about three months after the conclusion of the test the contractors were orally notified of an unconditional acceptance, and about six months afterwards, of a conditional acceptance.

Delay Equivalent to Acceptance.

These circumstances in the case of a private party would be regarded as estopping him from contesting the propriety of the expenditures on the part of the contractors and sub-contractors and would be treated as a breach on his part of the obligation to test and pass upon an article without delay. The rule should be the same when the government is involved.

In *United & Globe Rubber Manufacturing Companies* v. *United States*, 51 C. Cls. 238, it was said (p. 248):

"If articles of merchandise to be manufactured and delivered under certain precise specifications and subjected to certain prescribed inspections and tests meet the specifications, inspections, and tests, and no complaint with respect thereto is made within a reasonable time after their final delivery, the transaction under the contract is closed. It is the equivalent of final acceptance and can not be reopened because of the failure to apply a test which could and should have been made in the first instance, which when belatedly applied demonstrated an alleged defect. *Brown* v. *United States*, 1 C. Cls. 307; *Finney* v. *United States*, 32 C. Cls. 546; *Universal Trading Co.* 20 Comp. Dec. 337; *Carlisle & Thomas*, 21 Comp. Dec. 150.

"What constitutes a reasonable time depends upon the circumstances of the individual transaction, the nature of the merchandise to be furnished, and all the attendant incidents of the contractual obligations. *Shearer* v. *Park Nursery Co.* 103 Cal. 415. In this case suction hose, when delivered, is susceptible of practically immediate inspection and test."

In this case the test having been completed on the 9th of August and the test officially reported to the Bureau promptly upon its conclusion, there was no possible justification for a delay of three months in the Chief of Bureau passing upon the test and another three months in the Secretary of War acting upon the Bureau Chief's decision. The delay of six months in passing upon the test is the equivalent of an acceptance.

Contract Criterion Changed.

In all these controversies between the claimants and the Bureau it must be, we think, apparent that the real question under the contract was one thing, while the question acted upon by the Ordnance Office and the De-

partment was quite another thing. The contract was made during war for a gun with 2,600 foot seconds muzzle velocity. The contract was annulled after the war because not what the officials then wanted.

The only question legally before the Ordnance Office and the War Department was whether the gun was what the government had contracted for, not whether it was what the then officials preferred to have. The description of the gun contracted for is very explicitly detailed in the contract (rec. p. 9).

Added Test Unreasonable.

The test provided for it was of an unusually severe character. Reference to some of the reports of the Chief of Ordnance will show that the test of 300 rounds or less provided for by the contract (rec. p. 10, 3d line) is a very severe one. The usual life of a gun of this kind is not more than the 300 rounds provided for a test. We quote from several reports of the Chief of Ordnance:

"Accompanying the use of the larger charges of powder there was introduced a new element limiting the life of guns, namely, that of erosion of the bore. This was very great in the neighborhood of the seat of the projectile, and very decided in its action, scoring and guttering the surface in a manner which required its renewal after a certain number of rounds. The life fixed by this process, however, was not unreasonably short, a 10-inch gun being capable of enduring from 250 to 300 rounds before requiring relining, so that the question of limiting the power because of this difficulty was scarcely considered. With the general use of smokeless powder, however, with its still better control of the rate of burning, and the great increase in the powder charges and in the velocity, the subject of the wear of the bore has greatly increased in importance. This wear is of a different kind from that described above, being unaccompanied by the deep guttering of the surface which was experienced

with the powder immediately preceding, but the smooth and even wearing away of the surface proceeds with such rapidity that after some 50 or 60 rounds from large guns the rifling is so worn away that the projectiles are no longer given the motion of rotation necessary to steadiness of flight, and inadmissible loss of accuracy results. There has, therefore, been brought about a serious consideration of the question whether the guns should not be used at a power less than that which their strength enables the realization of in order to diminish the erosion and increase the life. (Report of Chief of Ordnance, 1905, p. 27.)

"SERVICE GUNS AND MORTARS.

"In my last annual report I spoke of the influence of erosion in limiting the life of heavy guns, and of the possible necessity of finding some method of securing the necessary power less expensive than that involved in using the very high velocities of projectiles now employed, with the accompanying rapid wearing away of the rifling, in such manner as to destroy the accuracy of the gun after a few rounds. Going into the subject in more detail and considering the 12-inch gun of the model of 1900 as an example, we have for the life of this gun, firing a projectile of 1,000 pounds weight with a velocity of about 2,500 feet per second, only about 60 rounds. As the gun is capable of firing for a considerable interval at the rate of 45 rounds per hour, it is seen that the limit of its life could be reached in less than an hour and a half. It has been considered that, in attempting to run by fortifications guarding the entrance of a harbor, the period that would elapse from the time that the leading vessel of the fleet would come within range until the last vessel would pass beyond the range of coast guns would be about two hours; it is therefore evident that a new 12-inch gun would not last through such an engagement. Similar statements can be made with regard to guns of smaller calibers, although as the caliber diminishes the admissible velocity increases. The 6-inch gun of the model of 1900, firing a projectile of 100 pounds weight with a velocity of 3,000 feet per second, *would have a life of 150*

rounds, corresponding to about an hour and a quarter at the rate at which the gun can be fired. It needs only a statement of the situation to show the necessity for doing something to meet it, notwithstanding that the accuracy of the guns could be restored by relining them, at much less than their original cost." (Report of Chief of Ordnance, 1906, p. 25.)

"It will be noted that our 6-inch, 10-inch, and 12-inch guns used at their highest power can not be expected, even if perfectly new, to last through an engagement of greater duration than 1¼ hours. This lack of staying power is sufficient, it is thought, to condemn them as a part of existing or future armament, and it remains to ascertain what measures should be taken in order that gun superiority shall not be sacrificed. The data show that the lives of our guns can be prolonged to an extent which may be considered reasonable and necessary by reducing the muzzle velocity. Table VII shows the amount of advantage to be gained by reducing the muzzle velocity to 2,250 or 2,150 feet per second." (Report of Chief of Ordnance, 1906, pp. 79, 80.)

The severity of the contract test "300 rounds or less" and the unreasonableness of the requirement of 100 more are illustrated by other provisions of the contract. After the first complete gun was tested and approved the contractors are to deliver "four guns with mounts," etc., "(subject to 5 usual proof rounds in the usual way) every month," etc. (rec. middle p. 10). Also by a further provision (foot p. 10) by which the United States reserved the right to order 150 additional guns, "each gun to be subject to 5 proof rounds in the usual way only." Thus it appears that 5 rounds are the usual test of a gun, not 300 or 400, which, as we have seen by quotations from official reports practically exhaust the life of a gun.

Hence when it was proposed in the indorsement of the Chief of Ordnance "that in view of the moderate pres-

sure to which this gun has been subjected, the department fire it 100 additional rounds, or less, as it may deem expedient, with charges giving higher pressures" (Finding IV, middle p. 18), the proposition was to subject the gun after it had already successfully withstood the unusually severe test provided by the contract, to a further test not provided by the contract of a severity beyond anything to which heavy ordnance can reasonably be subjected.

The Term "Satisfactorily."

By the opinion of the court below it will be seen that the Court of Claims did not agree with the construction of the contract as suggested on behalf of the United States and denied the contention of appellee that there was any basis in the contract for the position that the decision of the Chief of Ordnance, or the Secretary of War, could be treated as final, or that the same could not be questioned in the courts.

The Court of Claims, in its opinion (rec. pp. 25–26, and 51 C. Cls. 32–34), specifically discussed the word "satisfactorily" in the provision of the contract as to "the type gun passing its test satisfactorily" (rec. near top p. 10). The opinion frankly indicates that the discretion exercised by the officials must be justified, if at all, upon the construction of the word "satisfactorily," as used in the contract, and recognizes, as a principle of construction, that such meaning as may be given thereto must not be "inconsistent with other provisions," yet the court, in applying the principle to the facts found by it, could alone reach its conclusion by disregarding this principle.

The court also holds, citing authority:

"If the gun passed through the test in reasonable

compliance with the contract, it was the contract duty of the Government to accept it." (Rec. two-thirds down p. 25.)

The gun having satisfactorily passed the contract test, the question whether the claimants could not furnish something better to meet the desire of the Department for an improved gun, became a legitimate subject of negotiation. Upon such negotiations the claimants entered and the record shows that they were entirely willing to meet the desires of the government. The annulment came while matters were in a state of negotiation.

Contract Summarily Annulled While Under Suspension.

Even if the type 5-inch gun was not in fact or in law accepted, it was certainly not finally rejected. Its acceptance was at most held in abeyance until the problems connected with its manufacture could be worked out by a method mutually agreed upon by the parties.

In this connection the conditions surrounding the making and problems of the contract require consideration. The original contract was entered into during the height of the war with Spain, May 18, 1898 (rec. p. 8).

The test of the first type gun occupied from March 8 to August 9, 1899 (Finding III, p. 15). The inspecting officer made his report to the Chief of Ordnance, but it was not until November 3, 1899, that the bureau chief made his report to the Secretary of War that the gun "has apparently met the contract requirements" (Finding IV, p. 18), but suggested a further test of 100 additional rounds and some modifications to be made in the gun.

Between two and three months had passed from the submission of this recommendation by the chief of

bureau to the Secretary of War, when a firm of attorneys in New York, January 22, 1900, wrote the Secretary of War, stating that they had been retained as counsel by the claimants in the matter of certain modifications in the guns in question, as to which they understood a question was then pending in the War Department, upon which they asked an opportunity to be heard before it was considered and decided by the department.

This letter was referred to the Chief of Ordnance on January 27, 1900, who indorsed thereon a statement of the status of the case.

On January 31, 1900, the Secretary of War approved the recommendation of the Chief of Ordnance for a modified acceptance and on the same date wrote the attorneys that it did not appear that there was pending before the department any question in relation to the contract referred to (Finding V, pp. 18, 19).

Here, the entire question of what should be done in view of the test of this gun had been pending in the office of the Secretary of War upon the recommendation of the Chief of Ordnance for about three months. The circumstances make it a fair inference that nothing but the letter of the New York attorneys called it up and prevented still further delay. The attorneys' letter was dated January 27, and the Secretary's action on the subject took place on the 31st. His response to the letter of the attorneys that it did not appear that there was pending before the department any question in relation to the contract referred to, seems to have been anything but frank or candid.

However this may be, the inspecting officer February 6, 1900, in compliance with orders from the Chief of Ordnance, notified the contractors of the decision and recommendation of the Chief of Ordnance and its approval by the Secretary of War (Finding IV, last par. p. 18).

On February 9, 1900, the contractors wrote the Secretary of War asking suspension of action until they could be heard in the matter, and stating that they had not as yet assented to any modification of the gun and carriage and that they had not been informed in any precise and definite manner what those proposed modifications were except in reference to the carriage, and that they could not understand upon what principle the type gun was to be subjected to a further test of 100 additional rounds with charges giving higher pressures. (Finding V, last par. p. 19).

About one week later, February 17, 1900, they wrote the following important letter to the Chief of Ordnance:

"In pursuance of the suggestions of Maj. Smith and yourself, we have employed Professor Denton, of Stevens Institute, at Hoboken, N. J., as an expert to work out the various problems connected with the construction of the 5-inch Brown segmental tube-wire gun.

"At Prof. Denton's request we have also employed and associated with him in our work Mr. Webb, Professor of Mathematics in the Stevens Institute. It will be necessary, however, for these gentlemen to have some technical assistance in their work, and it has therefore been suggested that it will be of the greatest benefit if an officer of practical experience with artillery could be connected with them in the work. Of course we should expect to make proper compensation to any officer so employed, as it will only occupy time when he would otherwise be at leisure. If this plan should commend itself to you, we would suggest Maj. James M. Ingalls as one whose ability and experience would qualify him for the work in a high degree. We have had some communication with Maj. Ingalls on the subject, and he has expressed his willingness to make such an arrangement, provided that it meets with the approval of the department and yourself. Hoping this suggestion will receive your favorable consideration, we are, with great respect, etc."

On February 19, 1900, the Chief of Ordnance submitted this letter to the Secretary of War, with the following indorsement:

"As this office had no information as to the mathematical basis on which the Brown segmental 5-inch and 6-inch wire guns were being built, and the company was unable to furnish it, it was suggested to the trustees by this office last spring that they employ a competent person to investigate the matter and demonstrate analytically that the claims of the company respecting the merits of their system were well founded, as well as to determine theoretically the best tensions to be employed in applying the wire. The within letter is the outcome of the suggestion made at that time by the department. I would therefore respectfully recommend that the within request be approved and that Maj. Ingalls be authorized to render the assistance desired by them if it can be done without interfering with the discharge of his regular duties."

On the same date, February 19, 1900, this indorsement and recommendation of the Chief of Ordnance was approved by the Secretary of War.

"The said Denton, Webb, and Ingalls first went to Birdsboro, Pa., and there inspected and examined the gun. The claimant, Brown, went repeatedly to the Stevens Institute of Technology at Hoboken, N. J., with models, plans, and charts, which he furnished to Professor Denton, and also gave Ingalls data in regard to the firing of the gun.

"The said Denton, Webb, and Ingalls, upon being employed by the claimants, extended their investigations over a period of practically a year, at the close of which reports were made by them to the claimants, but not, however, until after the annulment of their contract by the Chief of Ordnance, as hereinafter set forth.

"These reports were, upon the whole, favorable to the style of construction of the gun; but defects of construction were pointed out and remedies therefor suggested in

the way of modifications in the construction." (Finding VI, pp. 19, 20.)

Instead of waiting for this report to be made, the Chief of Ordnance recommended, and the Secretary of War approved, an annulment of the contract.

This action, too, was taken in a somewhat significant manner. At nearly a year after the previous action, when the details must necessarily have faded from the recollection of the head of a great department, Captain MacNutt's report of the test with the prior indorsements thereon was on January 11, 1901, sent to the Secretary of War with a sixth indorsement recommending that his office be authorized to declare the said contract null and void because of the claimant "having failed to comply with the requirements of the Secretary of War and in further accordance with the provisions of the contract." (Finding VII, p. 20.)

By referring to the last paragraph of Finding IV (p. 18), it will be seen that the last indorsements on Captain MacNutt's report were those of the Chief of Ordnance and Chief of Engineers of November, 1899, and of the Secretary of War approving the recommendation of the Chief of Ordnance January 31, 1900.

Yet, apparently without any reference whatever to the very important action on the contractor's letter of February 17, 1900, referred to in Finding VI, pp. 19, 20, these indorsements were sent to the Secretary of War nearly a year later in a manner to imply that there had been failure on the part of the claimants to comply with the requirements made by the Chief of Ordnance in his indorsement of November 3, 1899 (top p. 18) which was approved by the Secretary of War January 31, 1900.

The promptness of the action of the Secretary of War

on this recommendation was in striking contrast with his delay of three months about a year before in acting on the recommendation of the Chief of Ordnance for a qualified acceptance.

Here, the Chief of Ordnance recommended an annulment of the contract on the 11th of January. Only six days later, on the 17th, he informed the contractors that with the approval of the Secretary of War the contract was annulled. No notice was given the contractors of the intended action.

"And thereupon, on the 17th day of January, 1901, the Chief of Ordnance wrote the claimants that, as they had up to that time failed to deliver an acceptable gun, their contract was thereby declared null and void." (Finding VIII, p. 20.)

Looking at the object of the reference of this entire matter to the experts, referred to in the claimants' letter of February 17, 1900 (Finding VI, p. 19), it will be seen that the object was "to work out the various problems connected with the construction of the 5-inch Brown segmental tube-wire gun."

The name of "an officer of practical experience with artillery" was suggested by the contractors. These suggestions were approved by the department and the artillery officer named was "authorized to render the assistance desired by them *if it can be done without interfering with the discharge of his regular duties.*" (Finding VI, near top p. 20.)

This language emphasizes the fact that at that stage time was no longer so important an element in the performance of the contract as was a proper working out of the technical problems.

Major Ingalls is shown by the last published official Army Register for 1916, p. 563, to have been at that time

on the active list as major of the 5th Artillery. On the 5th day of October, 1900, he was promoted to lieutenant-colonel and transferred to the 3d Artillery. He was retired from active service January 25, 1901. Thus he was an officer on the active list of the Army during the entire time of the currency of this contract and until after its annulment.

The thoroughness with which the experts considered the subject, as well as the good faith and diligence of the claimants in supplying them with all necessary information, is attested by the terms of the finding.

The claimant, Brown, went repeatedly to the Stevens Institute of Technology with models, plans, and charts, and he furnished Colonel Ingalls, the Army officer, data in regard to the firing of the gun and did everything possible to enable the experts, appointed by the action of the parties, to complete their labors. (Finding VI, near top p. 20.)

The finding of the Court of Claims (Finding VI, rec. one-third down p. 20) is that the experts "extended their investigations over a period of practically a year." This finding means that the experts did not idle away their time, but extended their investigations over this period.

Not the slightest intimation is shown by the findings to have been conveyed by the Chief of Ordnance or Secretary of War either to the contractors or to the experts that the matter was getting urgent and that a report was due from them.

It was certainly competent for the head of the Ordnance Bureau and for the Secretary of War to waive the limit of time in the delivery of the guns. Their action was such a waiver.

The remarks in the opinion of this court in *Maryland Steel Co.* v. *United States*, 235 U. S. 451, 456, 457, are pertinent in this connection:

"It may be that the Government would have had the right to annul the contract upon the default of appellant and avail itself of resultant remedies. It did not do so, but preferred to retain the contract and extend the time of its execution; and, we may assume, upon a consideration of the circumstances, as much in view of the government's interest as appellant's interest, the government suffering no damage by the delay, but getting the instrumentality for which it had contracted in time for its purpose, sooner, indeed, it may be, than if it had annulled the contract with appellant and relet the work to another. These were considerations which the Quartermaster General, in the government's interest, might well entertain. And it may have seemed to that officer that it would have been as harsh as it would have been useless to sacrifice what had been already done, and faithfully done, by annulling the contract or by refusing to excuse the delay in final performance which was without fault. The case should be judged by that consideration and conduct."

If this were true in regard to the construction of a standard machine like a dredge, which was involved in that case, how much more forcibly does it apply to a case like this, where the contractor was the inventor of a new kind of gun. There were important problems to be worked out in which it was important to secure the best expert assistance. Surely the good faith of the contractors is amply demonstrated by their offer to supply this expert assistance at their own cost as well as by the repeated conferences which they held with these experts and the data which they furnished.

The Question Submitted to the Experts.

A brief comparison of the facts appearing in different parts of the record shows clearly what was the question submitted to the three experts selected by agreement be-

tween the contractors and the Ordnance Office in February, 1900.

The only trouble found with the gun on the test was a variation of $\frac{1}{1000}$ of an inch, not exceeding the thickness of a sheet of paper. Even that only appeared upon one occasion. It was "to some extent due to deposits of metal on the walls of the bore by abrasion from the projectile in its passage from the gun," for which the gun or its manufacturers were certainly not responsible.

There was also, however, (near foot p. 16) "an actual contraction of the bore by the compression of the liner tube forming the walls of the bore by the elastic *tension* of the wire with which the tube and its enveloping segments were wound and bound together, which *tension*, with the further increase therein resulting from the explosion of the charge upon reaction after the explosion, exercised a compressing effect upon the liner tube."

In a conversation of the contractors with Major Smith, the responsible officer of the Ordnance Office (middle p. 17), it was said "that certain modifications in the construction of the gun were advisable and would be made in any succeeding guns that might be constructed under the contract."

These proposed modifications were not sufficiently serious to prevent Major Smith from telling the contractors that the gun "appears to have passed" its test, and that they might go on with the completion of the guns. (Finding IV, two-thirds down p. 17).

The modifications which the Ordnance Office desired and which the contractors were willing to make evidently had reference to relieving this tension of the wire, which never reached a point of actual danger to the gun (near top p. 17).

The Chief of Ordnance in submitting the matter to the Secretary of War (near top p. 20), gives as his ob-

ject for the employment of a committee of experts to "demonstrate analytically that the claims of the company respecting the merits of their system were well founded, as well as to determine theoretically the best *tensions* to be employed in applying the wire."

"The merits of their system" were settled when the government made a contract with them for guns of that construction (contract, top p. 9).

The problem how "to determine theoretically the best tensions to be employed in applying the wire" was evidently regarded by the Ordnance Office in February, 1900, as capable of solution, under competent expert advice, in such manner as to produce complete satisfaction to the officials of the government.

The expectations on the part of both the department and the contractors as to this problem being capable of solution by the experts were entirely fulfilled by the very thorough and extended investigations of the experts resulting in their reports (end Finding VI, middle p. 20):

"These reports were upon the whole, favorable to the style of construction of the gun; but defects of construction were pointed out and remedies therefor suggested in the way of modifications in the construction."

Thus "the merits of their system" were fully sustained by the investigations and reports of the experts. "The best *tensions* to be employed in applying the wire" were evidently shown in a satisfactory manner by the suggestions made by the experts "in the way of modifications in the construction."

To annul the contract on the very eve of the making of this favorable report, which if accepted, promised a satisfactory solution of all the problems which had arisen in the practical construction of the gun, was certainly in breach of the contract.

Annulment Without Notice Not Warranted.

According to the terms of the contract the annulment is only permissible "if any default shall be made by the parties of the first part in delivering any or all of the guns, etc., mentioned in the contract, of the quality and at the times and places herein specified" (record, p. 11).

Was there such default? There certainly had not been any in delivering the type gun. The time was extended and the gun delivered within the limit of the extension. The type gun was admitted to have met the contract requirements. Something was desired to improve the further manufacture of the guns so as to make them more desirable for service. There had been negotiations on this subject between the contractors and the officers of the government. Experts were at work by agreement of the parties "to work out the various problems connected with the construction of the 5-inch Brown segmental tube wire gun," as well as "to determine theoretically the best tensions to be employed in applying the wire."

An army officer was authorized to act as one of these experts in his spare moments.

It may well be said of the reference of these problems to experts as the Court of Claims said in *King* v. *United States*, 37 C. Cls. 428, 437:

"It was equivalent to a notice that while that condition of affairs lasted the engineer in charge would not annul the contract."

Had the department the power to treat the contractors as in default and annul the contract when matters were in this situation?

The principle applicable in such cases is clearly set forth by the Court of Appeals of New York in *Taylor* v. *Goelet*, 208 N. Y. 253, 258:

"This court has held that where an executory contract fixes the time within which it is to be performed, and performance within that time is waived by the parties to the agreement, neither party can thereafter rescind the contract on account of such delay without notice to the other requiring performance within a reasonable time, to be specified in the notice, or the contract will be abrogated. By the waiver time as an essential element of the contract has been removed therefrom, but it can be restored by a reasonable notice demanding performance, and stating that the contract will be rescinded if the notice is not complied with. (*Lawson* v. *Hogan*, 93 N. Y. 39; *Schmidt* v. *Reed*, 132 N. Y. 108)."

The type gun had been delivered in time. It had certainly not been rejected. Its test had "apparently met the contract requirements," yet the Department expressed a desire for something better.

The contractors were ready to make any improvements within reason. Experts were at work with the concurrence of both parties on the problems involved.

According to the rule stated by the New York Court of Appeals in the case cited, there could be no annulment as for a default without some notice by one party to the other to perform.

Such a rule applies with peculiar force to this case. The suspension of performance was by direct authority of the Department itself, for the purpose of enabling problems connected with the details of construction to be satisfactorily solved.

Forfeiture Not Retroactive.

Thus it has been shown that, upon the facts found by the court below, there were four distinct breaches by the government of the contract in suit, namely:

(1) By delay in passing on the test for about six months;

(2) By withholding payment for the type gun, after admitting that it had passed its test;

(3) By demanding, as a condition to acceptance, that the type gun should be subjected to a character of further test expressly excluded by the contract itself, limiting the firing to 300 rounds; and

(4) By summary annulment pending suspension or while time had ceased to be of the essence, without first giving the requisite legal notice.

To the propositions which have already been presented above, we would add still another, namely:

Assuming that it was within the power of the officials without notice as aforesaid to annul the contract on January 17, 1901 (which is denied), such action was not retrospective in its effect and did not deprive claimants of their right to recover upon these prior breaches of the contract by the Government for damages theretofore sustained by claimants.

The contract in suit, pp. 11 and 12, provides:

"5th. If any default shall be made by the parties of the first part in delivering all or any of the guns, etc., mentioned in this contract, of the quality and at the times and places herein specified, then, in that case, the said party of the second part *may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said parties of the first part shall be charged with the expense resulting from such failure.* Nothing contained in this stipulation shall be construed to prevent the Chief of Ordnance, at his option, upon the happening of any such default, from declaring this contract to be *thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred;* but in case of overwhelming and unforseen accident, by fine or otherwise, the circumstances shall be taken into equitable consideration by the United States, before claiming forfeiture for non-delivery at the time specified." (Italics supplied.)

In the case of *P. W. & B. R. R. Co.* v. *Howard*, 13 Howard, 307, 339–344, this court had before it a far more stringent provision for annulment, coupled with a very similar provision for continuing the liability of the contractor, and wherein this court sustained the 6th instruction to the jury to the effect that the exercise by the railroad company of its power to annul the contract—

"did not deprive him (the contractor) of any rights vested in him at that time, or make the covenant void *ab initio*, so as to deprive him of a remedy upon it for any money then due him for his work, *or any damages he had then already sustained.*"

The contract in that case contained this provision:

"Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due process of execution, or that the said party of the first part is irregular or negligent, then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to or question the same in any place, under any circumstances whatever; *but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said non-compliance, irregularity, or negligence.*" (Italics supplied.)

In sustaining the instruction quoted this court, speaking through Mr. Justice Curtis, among other things said:

"*The law leans strongly against forfeitures, and it is encumbent on the party who seeks to enforce one, to show plainly his right to it.* The language of the contract is susceptible of two meanings. One is the literal meaning for which the plaintiff in error contends, that the declara-

tion of the company annulled the contract, destroying all rights which had become vested under it" etc.

"Another interpretation is, that the contract, so far as it remained executory on the part of the contractor, and all obligations of the company dependent on the future execution by him of any part of the contract might be annulled. We can not hesitate to fix on the latter as the true interpretation.

"*In the first place, the intent to have the obligation of the contractor, to respond for damages continue, is clear.* In the next place, though the contractor expressly releases all right to except to the forfeitures, *he does not release any right already vested under the contract*, by reason of its past performance, and *expressio unius exclusio alterious.*

And finally, *it is highly improbable that the parties could have intended to put it in the power of the company to exempt itself from paying money, honestly earned and justly due, by its own act declaring a forfeiture.*" (Italics supplied.)

Damages.

For these reasons it is submitted that the judgment of the Court of Claims should be reversed and the cause remanded, with directions to award to the claimant, the amount of the expenditures made by the contractors and their subcontractor.

Expenditures made by a subcontractor are as valid a subject of recovery as are those personally made by the contractor from his own funds.

Here, the contractors with a contract to furnish half a million dollars' worth of heavy artillery could comply with their contract only by securing the services of a properly equipped foundry. As the most practical, and indeed only proper, means of complying with their contract they interested in it a company owning and operating a large foundry and machine shop and obtained the signatures of the officers of that company as sureties on

their bond. They made a subcontract with the company at specified rates of compensation for the construction of all guns and mounts which they might require made under their contract. The company made large increases in its plant and equipment for the very purpose of carrying out the subcontract. This work was performed under the personal guidance of the contractor, Brown. The contractors were of course personally accountable to the company for its expenditures in fulfilling the subcontract.

The subject is fully discussed in *Hobbs* v. *McLean*, 117 U. S. 567, which was a controversy between a contractor, who had recovered money from the United States, and a subcontractor through the use of whose capital an otherwise impecunious contractor had been enabled to carry out his contract with the government. It was held that such an arrangement was not forbidden by any statute of the United States. This doctrine has been reaffirmed and applied in *Portuguese-American Bank* v. *Welles*, 242 U. S. 7, 13.

In *United States* v. *Behan*, 110 U. S. 339, the rule of damages in a case like this, where the government put an end to a contract without paying the contractor anything after he had expended money on the completion of the contract, is very clearly stated.

The court there says (pp. 343, 344):

"The claimant has not received a dollar, either for what he did, or what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were

foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses."

And again (pp. 345, 346):

"But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract."

This is exactly what is here claimed. Nothing is here claimed for profits. The entire claim is for the actual expenditures of the contractors and their sub-contractors in the fulfilment of the contract. That these expenditures when made by sub-contractors are just as valid grounds of recovery by the principal contractor as if made by the principal contractor himself is shown in the two decisions of *Stout, Hall & Bangs* v. *United States*, 27 C. Cls. 385 and *Pneumatic Gun Carriage Co.* v. *United Stacts*, 36 C. Cls. 71, 88, 89.

Conclusion.

We have shown that in the light of all the facts as found by the Court of Claims, the court below has erred, as a matter of law:

(1) In treating as valid the annulment by the Chief of Ordnance and the Secretary of War of the contract in suit;

(2) In so construing the word "satisfactory," as contained in the contract, as to confer upon said officials the power to reject the character of article of manufacture contracted for, to exact from the contractor something not specified in the contract, to materially alter the criterion by which the product of manufacture was to be measured by means of a certain test definitely provided in the contract, and to so extend the severity of such test as to exceed the maximum limitation of firings therein specified;

(3) In disregarding as a breach the contract obligation to pass upon the work of manufacture with promptness and without unnessary delay, the delay on the part of the appellee occurring from August 9, 1899, when the test was completed, until January 31 and February 6, 1900, the respective dates of official action on the test by the Secretary of War and notice thereof;

(4) In denying the right of claimants to recover the amount of damages found by the Court of Claims to have been sustained by claimants directly and through their sub-contractor;

(5) In failing to at least find for the claimants in the sum of $7,263.33, the actual amount of expenditures induced by the conduct of the appellee between the time they were advised by the official of the War Department in immediate charge of the test that the type gun had passed the test and claimants could "go on with the com-

pletion of the gun " and the time at which they were notified of the action by the Secretary of War placing certain conditions upon acceptance;

(6) In sustaining as within the power and authority of said officials to rescind or annul the contract, without first giving notice to the claimants specifying a reasonable time within which to perform, notwithstanding the previous suspension of the contract or extension by the government of time provided therein, involved in the concurrent action of the parties, as delineated in the findings, referring certain questions of importance in the further manufacture of the guns to certain experts for consideration and report.

(7) In so extending the doctrine of forfeiture of an executory contract as to render it retroactive in its effects, cutting out the right of claimant to recover damages theretofore sustained by reason of the several breaches of the contract by the government.

The judgment should be reversed and the case remanded with directions to enter judgment in favor of the appellant for the actual amount of the expenditures made in and about the fulfillment of the contract, as found by the court below (Finding VIII, pp. 21, 22), in the sum of $95,770.28.

GEORGE H. LAMAR,
GEORGE A. KING,
Attorneys for Appellant.

Supreme Court of the United States.

October Term, 1917.

OLIVER B. SAALFIELD, Administrator of JOHN HAMILTON BROWN, surviving Claimant of JOHN H. BROWN and HARVEY M. MUNSELL, *Appellant*, v. THE UNITED STATES. } No. 101.

BRIEF IN REPLY FOR APPELLANT.

Official Report of Tests.

The Assistant Attorney-General quotes in his brief at pp. 8 to 11, an extract from the report of Captain MacNutt to the Chief of Ordnance, referred to in Finding IV (rec. p. 17). The extract here given admits (two-thirds down p. 10 of appellee's brief): "The test of the gun and its mount was closely limited by the stipulations of the contract. No test was required for accuracy," etc. Also (near foot p. 10) "that the reduction of the charge" which was required of him by the ruling of the Chief of Ordnance (rec. near top p. 16) "cut down the pressures to a very safe figure." He further states (brief for the United States, near top p. 11): "I would consider that the test proves only that the gun and carriage together will stand 2,600 foot-seconds velocity and that for five rounds the pressures may reach 50,000 pounds per square inch; in other respects the test is inconclusive," etc. (not, as printed in the brief for the United States, "conclusive.")

Professor Denton's Report.

The learned Assistant Attorney-General further quotes (at p. 12 of his brief) par. 4 of the conclusions arrived at by Prof. Denton in association with Prof. Webb. It is thought but fair, as long as paragraph 4 of Prof. Denton's conclusions is quoted, that his entire conclusions in six paragraphs be given just as stated by him and as they are shown by his official report on the files of the Court of Claims from which the quotation at p. 12 of the Assistant Attorney-General's brief is taken. Prof. Denton writes:

"STEVENS INSTITUTE OF TECHNOLOGY,

"DEPARTMENT OF TESTS,

"HOBOKEN, N. J., *January 17th, 1901.*

"TRUSTEES OF THE BROWN
SEGMENTAL TUBE WIRE GUN,
"Temple Court, New York City.

"GENTLEMEN:—

"I have examined at your gun shop, the process of construction of your 5-inch B. L. 'Segmental Tube' Wire Wound Rifle, and in conjunction with my colleague, Professor J. B. Webb, I have made a mathematical analysis of its stresses, the details of which are appended hereto.

"The conclusions to which these investigations lead are as follows:

"I. In this gun there are interposed between a lining, or firing tube, about ¾ of an inch thick, eighteen thin curved sheets of metal, varying in aggregate thickness from 1.7 to 0.4 inches, forming what is called the 'segmental core' or 'tube' (Plates 10, X, Y and Z), so that by means of the tension due to the wire winding all parts of this core will, in my opinion, be bound together with sufficient pressure to cause the frictional adhesion between its curved lines of division to exceed the shearing forces which would be transmitted along these lines

in a forged tube of the same thickness, when fired with powder developing the highest current pressures.

"II. The metal of the segmental core, by virtue of the magnitude of its frictional adhesion, is as available as a source of longitudinal strength, and transverse stiffness, as the same thickness of solid metal.

"III. The division of the core into parts gives it an advantage over the same thickness of solid metal, in that a crack, or incipient rupture, at any point will not depreciate its usefulness; whereas a flaw in solid metal may induce rupture of the structure.

"IV. The distribution of the wire windings secured a practically uniform compressive resistance in the firing tube throughout its length, and without exceeding about 90 per cent of the elastic strength of the tightest wire, the lining tube was probably compressed, so that with 50,000 lbs. per square inch of powder pressure it was not required to exert a tensile resistance.

"V. The stresses in the lining tube and core due to the wire windings probably subjected the metal of the lining tube and core to a degree of stress considerably greater than the elastic limit of their material, so that the sudden reapplication of these stresses after each explosion would tend to cause the metal to set itself to smaller diameters. This hypothesis accounts for the remarkable, though not unprecedented behavior of the gun in either reducing its bore or exhibiting no increase of the latter during the 300 shots made at its official trial. This action can be avoided in future construction by proper precautions and the use of material possessing a higher elastic limit.

"VI. With the experience now available and the proposed improvement of the 'stepped' liner (Plate XI), the mechanical operations required for the construction of the gun are such as can be accomplished with reliable accuracy and comparative expeditiousness.

"Very respectfully,

"J. E. DENTON,

"*Prof. Mechanical Engineering.*"

This report shows on its face that the system was recognized by the experts as being a good one, and that but for the precipitate action of the Ordnance Office and the War Department in annulling the contract the problems connected with the construction could and would have been worked out as was the object of the reference (Finding VI, pp. 19, 20). It emphasizes the argument made in appellant's brief (pp. 44–48) that there was no warrant for the annulment of the contract while the very question whether it could be satisfactorily completed was, by the action of the Department itself, under consideration by a committee of experts.

It will be observed (p. 12 of appellee's brief) that stress is placed upon what Prof. Denton says about the maximum powder pressure attained of 50,000 pounds per square inch not "exceeding 90% of the elastic strength of the tightest wire," and the assertion is made that this "meant that the stress was 90% of the ultimate strength of the tube inside and the tension on the wire was 90% of its elastic limit."

Even so, the Chief of Ordnance, in his capacity as arbitrator, in construing the language of the contract (rec. p. 16), found that "any charge that was sufficient to produce a muzzle velocity of 2,600 foot-seconds was all that was required by the contract, except for the five high pressure rounds required at the close of the test," and which muzzle velocity, according to the figures given at top of p. 16, would be produced by a pressure of only about 32,000 pounds per square inch, thus leaving a very large margin of safety.

But, even taking what is denominated by appellee in its brief (rec. p. 13) as "the service charge" producing "37,000 pounds pressure to the square inch," with 10% leeway of safety at 50,000 pounds, at 37,000 pounds there would be ample safety and at 32,000 pounds, the

normal pressure according to the criterion of the contract (rec. p. 16, first line), there would be an abundance of safety.

Only Decision in Arbitration Adverse to Government.

Apparently not satisfied with the effort, upon the facts found, to sustain the contention of the court below, "that the Chief of Ordnance was justified in his action in requiring an additional test of the type gun," and "that the contract was properly annulled," the appellee in its brief renews in this court the proposition rejected by the court below (rec. p. 26), namely, that by the terms of the contract the action of the officials below complained of was a decision in arbitration which was final and can not be questioned in the courts.

The brief of appellee in this court (pp. 5–7) treats the subject under the heading, "The Decision of the Chief of Ordnance That the Test Had Not Proven Entirely Satisfactory Was Final."

The opinion (rec. p. 26, near bottom) of the court below, after stating the proposition of the government and quoting the arbitration provision of the contract, and stating the rule of construction, disposes of the contention in these words:

> "That provision (of the contract) relates in terms to the interpretation of the contract, and doubtless could have been invoked if any question had arisen *as to the kind of test required by the contract*. But upon the broader question as to whether the gun had passed this test satisfactorily *we do not think this clause has any application*." (Italics supplied.)

That the act of annulment is subject to review by the court, there can be no question.

Unfortunately for appellee, however, the government

must not only justify an increase in the firings of 100 in excess of the maximum of 300 specified in the contract, but also an increase in the pressure far beyond what the arbitrator, in line with his duty under the contract, finally decided that it was the intention of the contract to permit. (Finding III, pp. 15, 16).

The department sought to require (rec. p. 18):

"100 additional rounds * * * with charges giving higher pressures and assimilating more nearly the pressures that would be experienced in actual services."

The Assistant Attorney-General, in his brief for appellee, p. 13, advises this court that it "is a matter of general knowledge" that "the service charge of powder used is 37,000 pounds pressure to the square inch." Hence he argues how reasonable it was to increase the number of shots in order to increase the pressure.

The final decision in arbitration on this very subject of pressures, during the process of the test, was that muzzle velocity of 2,600 foot-seconds, and not pressure beyond what was necessary to produce such shot impetus, was the desideratum of the contract, as executed in time of war.

While inapplicable as against the appellant, we submit that the authorities cited by appellee on the subject of the effect of the decision of an arbitrator are diametrically opposed to the attempted increase in the pressures over those construed to be within the meaning of the contract, as was the proposed increase in the number of the firings in direct conflict with the express terms of the contract.

Thus it will appear that the only decision by the arbitrators, or either of them as such, was in favor of the claimants. There was no appeal from this decision on the part of the government. The decision became final. It settled beyond question the meaning of the contract to be that, except for the five last high pressure rounds, the

gun was not to be subjected to pressures in excess of what was required to produce the specified muzzle velocity.

To sustain as legal the subsequent effort of the officials of the War Department to increase these pressures, as admitted to have been the purpose of the additional firings, would be to violate the basic principles of the decisions cited by the government on the subject of the finality and binding force of decisions in arbitration.

We submit that the attempt of the officials to coerce appellants into permitting what appellants had a right to resist was not well founded in law. The effort to increase the number of firings was in direct violation of the express terms of the contract limiting the same to three hundred rounds. The attempt to increase the pressures was in direct violation of the basic meaning of the contract as finally construed by the decision in arbitration.

For these reasons and for those more particularly set forth in our original brief, it is respectfully suggested that the decision of the court below should be reversed.

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